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THE EEOC SEXUAL HARASSMENT GUIDELINES: WELCOME ADVANCES UNDER TITLE VII?

Lynn McLain†

The interpretative guidelines on sexual harassment, recently promulgated by the Equal Employment Opportunity Commission, describe those acts taken toward an employee that the Commission considers employment discrimination prohibited by Title VII of the Civil Rights Act of 1964. Additionally, the guidelines define under what circumstances an employer will be held liable for sexual harassment of his or her employees. In this article, the author examines the new guidelines in light of their statutory bases in Title VII and case law interpreting the statute. She explains the guidelines' provisions and critically evaluates those sections she finds without statutory and case support.

I. INTRODUCTION

The term "sexual harassment" is generally understood to embrace such lecherous behavior as repeatedly making unwanted sexual propositions to an individual or touching another in a sexual way, without his or her consent.¹ Some understand the term to include the making of lewd comments.² The most egregious form of sexual harassment in the employment context is the extortion of sexual favors by a boss who threatens to fire an employee who refuses to submit.³ Such forms of harassment appear to be wide-

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1. *E.g.*, C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1-2 (1979) [hereinafter cited as MACKINNON]; James, *Court Extends Bar to Job Shift in Harassment Case*, *The Evening Sun* (Baltimore), Feb. 18, 1981, at D12, col. 1.
2. For a discussion of various definitions of sexual harassment, see U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* G-3-G-4 (1981) [hereinafter cited as *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE*]. The Office of Personnel Management defines sexual harassment as "deliberate or repeated unsolicited verbal comments, gestures or physical contact of a sexual nature which are unwelcome." *Id.* at 20.
3. See, *e.g.*, Note, *Job-Related Sexual Harassment & Union Women: What Are Their Rights?*, 10 *GOLDEN GATE U. L. REV.* 929, 936-37 (1980).

spread.⁴ In 1978, for example, over 70% of the women surveyed by the Working Women United Institute felt that they had been sexually harassed in their employment.⁵ Of these, 56% said they had experienced physical harassment and 91% reported that they had been verbally harassed.⁶ In a more extensive survey of federal government employees, 42% of the women and 15% of the men⁷ complained that they had been sexually harassed in the workplace during a two-year period from May 1978 to May 1980.⁸

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4. See, e.g., 45 Fed. Reg. 25,024 (1980) (supplementary information accompanying EEOC's interim guidelines on sexual harassment); Hosler, *Sexual Harassment Still the Norm at Fort Meade*, The Sun (Baltimore), Aug. 4, 1980, at A1, col. 1; Hosler, *Women Say Sexual Harassment is Driving Them Out of the Army*, The Sun (Baltimore), Dec. 16, 1979, at A1, col. 1; Priest, *Sexual Harassment*, San Jose Mercury News, Sept. 28, 1980, at IL, col. 1; Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 124 n.5 (1977); Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 879 & n.2 (1980); Note, *Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 HARV. WOMEN'S L.J. 173, 173-74 & n.5 (1980).
 5. Banisky, *Sexual Harassment on the Job: Who Says Boys Will be Boys?*, The Sun (Baltimore), Dec. 12, 1978, at B5, col. 1. One commentator interprets the results of this survey differently. She concludes that the survey showed that "from five to seven of every ten women" of a sample of 145 reported experiencing sexual harassment. MACKINNON, *supra* note 1, at 26, 249 n.5.
 6. Banisky, *Sexual Harassment on the Job: Who Says Boys Will be Boys?*, The Sun (Baltimore), Dec. 12, 1978, at B5, col. 1. But one author's estimates of the survey results are one-third and two-thirds, respectively. MACKINNON, *supra* note 1, at 29.
 7. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 3, 33, 36. These percentages are based on over 20,000 responses to a survey requested by the Subcommittee on Investigations of the House Committee on Post Office and Civil Service. *Id.* at v. The percentages for various types of sexual harassment are as follows:

	Women	Men
Sexual remarks	33%	10%
Suggestive looks	28%	8%
Deliberate touching	26%	7%
Pressure for dates	15%	3%
Pressure for sexual favors	9%	2%
Letters and calls	9%	3%
Actual or attempted rape or assault	1%	0.3%

Id. at 6.

8. *Id.* at 2.

Despite the fact that sexual harassment of employees is a long-standing problem,⁹ the courts have only recently begun to struggle with the question of when, if ever, sexual harassment in the workplace constitutes sex discrimination in employment prohibited by Title VII of the Civil Rights Act of 1964 (Title VII).¹⁰ Title VII prohibits discrimination in employment because of an individual's sex.¹¹ Although the statute does not define the term "sex," it has been consistently interpreted by the courts as being synonymous with gender.¹² The circuit courts of appeal which have addressed the issue are unanimous that, when certain other criteria are satisfied, harassment of employees of one gender but not of the other gender violates Title VII.¹³ There are conflicting interpretations of Title VII, however, with regard to the extent that the employer must have participated in, had knowledge of, or ratified the harassment, before the employer will be held responsible.¹⁴ The United States Supreme Court has not had occasion to grant certiorari in a Title VII sexual harassment case.¹⁵

Recently, the federal agency charged with the administration of Title VII,¹⁶ the Equal Employment Opportunity Commission

9. For example, a 1907 letter to the editor of New York's *Jewish Daily Forward* reads:

I am one of those unfortunate girls thrown by fate into a dark and dismal shop. In this shop there is a foreman who has a wife and several children. In spite of this, he often allows himself to "have fun" with some of the working girls. . . . Though my hard earned dollars mean a lot to my family of eight souls, I didn't want to accept the foreman's vulgar advances. He started to pick on me, said my work was no good, and when I proved to him he was wrong, he started to shout at me in the vilest language. He insulted me in Yiddish and then in English, so the American workers could understand. . . . I ran home and am now without a job and the girls in the shop are afraid to be witnesses against him. What can be done about this?

Leavitt, *What Shall I Do?*, The Sun (Baltimore), Apr. 22, 1981, at A19, col. 4. See also MACKINNON, *supra* note 1, at 175-79.

10. Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. § 2000e (1976 & Supp. III 1979).

11. *Id.* § 703(a)(1)-(2), 42 U.S.C. § 2000e-2(a)(1)-(2) (1976).

12. See notes 37-59 and accompanying text *infra*.

13. *E.g.*, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Business Prods., Inc., 552 F.2d 1032 (4th Cir. 1977) (per curiam). The first few federal district courts to consider the question held that sexual harassment was not the type of activity that was meant to be proscribed by Title VII. Each decision was reversed or vacated on appeal. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd & remanded*, 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated & remanded mem.*, 562 F.2d 55 (9th Cir. 1977).

14. See notes 227-41 and accompanying text *infra*.

15. No one has petitioned the Court for certiorari in such a case.

16. See Civil Rights Act of 1964 § 705(a), 42 U.S.C. § 2000e-4(a) (Supp. III 1979).

(EEOC), promulgated guidelines on sexual harassment.¹⁷ These guidelines serve to inform the public and the courts of the agency's position as to what type of conduct constitutes sexual harassment violative of Title VII.¹⁸ Through the new guidelines the EEOC has mounted an all-out attack against sexual harassment. Because such harassment is offensive and reprehensible, the agency's zeal is understandable. The EEOC's authority, as granted by Congress in Title VII, however, appears to be exceeded by the power the agency purports to wield through the guidelines. In its attempt to limit sexual harassment in the workplace, the EEOC seems to have lost sight of three important statutory bases that should be but are not adequately reflected in the guidelines. In order to be actionable as sex discrimination under Title VII, employment-related acts must discriminate between males and females,¹⁹ have significant adverse employment ramifications,²⁰ and be acts of an employer or its agents.²¹

This article describes and interprets some of the guidelines' provisions in relation to Title VII and the case law interpreting it. Three primary topics in this discussion are (1) the guidelines' failure to require a comparison of the employer's treatment of male and female employees;²² (2) the question of whether the harassment must have substantial adverse employment ramifications in order to be actionable;²³ and (3) the employer's liability under the guidelines for the acts of non-agents as well as its agents.²⁴ Before examining the language of the guidelines and recent EEOC and court decisions interpreting it, this article will explain the Title VII statutory provisions that are particularly relevant to sexual harassment cases and will describe the EEOC's role in the enforcement of Title VII. The article concludes with a brief

17. 45 Fed. Reg. 74,676 (1980) (to be codified in 29 C.F.R. § 1604.11).

18. *Id.* at 25,024 (summary accompanying interim guidelines). A subcommittee of the House Committee on Post Office and Civil Service requested the EEOC to publish the guidelines. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 19. The Commission first promulgated interim guidelines, now reported at 29 C.F.R. § 1604.11 (1980), which became effective April 11, 1980. 45 Fed. Reg. 25,024 (1980). After soliciting comments on the guidelines from the public, the EEOC reported that "[d]uring the 60-day public comment period which ended on June 10, 1980, the Commission received over 160 letters regarding the Guidelines on sexual harassment. These comments came from all sectors of the public, including employers, private individuals, women's groups, and local, state, and federal government agencies." *Id.* at 74,676. After considering the comments, the EEOC issued slightly revised, final guidelines on November 10, 1980, which became effective immediately. *Id.*

19. See notes 32-39 and accompanying text *infra*.

20. See notes 138-39, 176-79 and accompanying text *infra*.

21. See notes 207-09 and accompanying text *infra*.

22. See notes 91-137 and accompanying text *infra*.

23. See notes 138-206 and accompanying text *infra*.

24. See notes 207-77 and accompanying text *infra*.

discussion of common law and statutory remedies available to sexually harassed employees in lieu of or in conjunction with a Title VII action.

II. BACKGROUND: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII applies to most government employers²⁵ and to private employers engaged in an industry affecting commerce and having fifteen or more employees.²⁶ The major operative language of Title VII is found in subsections 703(a)(1)²⁷ and (2).²⁸ In order to sue successfully under either subsection, a plaintiff must prove three things: (1) the plaintiff was discriminated against "because of" his or her "race, color, religion, sex, or national origin";²⁹ (2) the discrimination had significant adverse employment ramifications for the plaintiff;³⁰ and (3) the discrimination was practiced by an employer covered by Title VII.³¹ A brief account of the meaning of Title VII's prohibition of discrimination "because of . . . , sex" will provide a backdrop against which the sexual harassment guidelines may be examined.

In order for there to be a violation of Title VII, there must first be inequality of treatment. To discriminate means "to make distinctions in treatment; show partiality (in favor of) or prejudice (against)."³² Thus, if an employer treats all employees and applicants the same, no matter how shoddily, he or she has not discriminated. For example, if an employer pays all of his or her employees only five cents an hour and beats all of them, there would

25. Civil Rights Act of 1964 § 717(a), 42 U.S.C. § 2000e-16(a) (1976 & Supp. III 1979). Notably excepted are members of Congress, whose staffs are not in the "competitive service." *Id.*

26. *Id.* § 701(b), 42 U.S.C. § 2000e(b) (1976). The employees must be employed "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.*

27. *Id.* § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1). Subsection (1) forbids an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

28. *Id.* § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2). Subsection (2) forbids an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.*

29. *Id.* § 703(a)(1)-(2), 42 U.S.C. § 2000e-2(a)(1)-(2).

30. *Id.*

31. *Id.* In this article, the term "employer" is also used to include employment agencies and labor organizations whose acts are governed by Title VII. *Id.* § 703(b)-(d), 42 U.S.C. § 2000e-2(b)-(d).

32. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 522 (2d ed. unabridged 1970) (italics omitted). "Discrimination" is also defined as "failure to treat all equally; favoritism." BLACK'S LAW DICTIONARY 553 (rev. 4th ed. 1968).

be no discrimination and thus no violation of Title VII.³³ So long as he treats all of his employees equally badly, Simon Legree may carry on without fear of Title VII.

Even if the employer does discriminate among its employees, the discrimination is not prohibited by Title VII unless it is based on race, religion, color, sex, or national origin.³⁴ Essentially, there are two accepted theories upon which a plaintiff may rely in making a *prima facie* showing that an employer's alleged discriminatory conduct was because of one of the prohibited factors: the disparate treatment theory and the disparate impact theory.³⁵ Of these, only the disparate treatment theory has been used in sexual harassment cases.³⁶

33. This employer, however, would probably be violating the minimum wage provision of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (Supp. III 1979). The employer would also be liable for civil and criminal assault and battery. See notes 286, 293-95 and accompanying text *infra*. See generally R. PERKINS, CRIMINAL LAW 106-30 (2d ed. 1969) (criminal assault and battery).

34. See, e.g., *Wright v. Allis-Chalmers*, 496 F. Supp. 349, 351 (N.D. Ala. 1980) (firing black plaintiff because he assaulted supervisor, even if in response to a racial epithet, was not termination because of race); *Caraway v. Ethyl Corp.*, 23 Empl. Prac. Dec. ¶ 31,075 (S.D. Tex. 1980) (delay in issuing plaintiff's disability checks not violative of Title VII because it was for reason other than race). See also MACKINNON, *supra* note 1, at 106-07.

35. For a brief discussion of some newer theories, see note 133 *infra*.

36. Therefore, the text of this article will not discuss the disparate impact theory. The landmark disparate impact case was *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Supreme Court held that the requirement that job applicants pass two standardized tests and have a high school diploma, not shown to be related to job performance, illegally discriminated against blacks, a large percentage of whom had no diploma and a disproportionate number of whom failed the tests. In applying *Griggs* to the sex discrimination arena, it becomes apparent that under the disparate impact theory, even though similarly situated men and women are treated alike, a *prima facie* violation of Title VII arises when the group of all women in the work force is given less of a chance for a job than the group of all men in the work force. *Dothard v. Rawlinson*, 433 U.S. 321, 329-30 (1977). *Contra, id.* at 348 (White, J., dissenting) (the Court should look not at the general population of women but only at those who are seriously interested in applying for the job in question). For example, if a female applicant for a job is rejected because she is not 5'6" tall and weighs less than 145 pounds, she need only prove that the minimum height and weight requirements have a disproportionately adverse impact on women. She must show that a statistically significant greater percentage of men meet the requirements than do women. *Id.* at 329. The burden then shifts to the employer to show that these criteria that have a disparate impact on women are job-related; that is, one must meet them in order to perform the job in question adequately. *Id.*; see, e.g., *Blake v. City of Los Angeles*, 595 F.2d 1367, 1374-83 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980) (evidence insufficient to show minimum height requirements valid despite adverse impact on women); *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 703 n.66, 710 n.76 (D. Md. 1979) (Baltimore City Police Commissioner's minimum height and weight requirements, imposed to keep women, who are "little balls of fluff," from being police officers, not shown to bear a "manifest relationship" to the job). If the employer can show that the selection criteria are job-related, then the burden shifts to the employee to show that there is an alternative available that will result in the hiring of equally qualified individuals but will have a less adverse impact on women. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1976). Of course, the same analysis would apply if the discrimination were directed toward males, who are members of a traditionally preferred class. *Cf. McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976) (Title VII protects whites from racial discrimination).

Disparate treatment based on sex exists whenever an employer treats similarly situated men and women differently simply because of their gender.³⁷ For example, if a male police chief who wishes to hire police officer trainees refuses to consider any female applicants simply because they are female, he clearly would be treating males and females differently and would be guilty of disparate treatment.³⁸ A showing that all females are excluded from consideration for a job is not the only means of proving disparate treatment. Even if the police chief changed his policy so that women would be eligible for a position as long as they had no pre-school children, he would still be guilty of disparate treatment if male applicants were considered for the job regardless of whether they had young children.³⁹ Again, he would be treating similarly situated men and women differently simply because of their gender. In order to avoid being guilty of disparate treatment, the police chief would have to deny consideration to both mothers and fathers of pre-schoolers or allow females with young children the same opportunity as their similarly situated male counterparts.

As is illustrated by the above examples of disparate treatment, the word "sex" in Title VII has been interpreted to mean "gender" rather than its other, more titillating, connotations.⁴⁰ This interpretation, equating "sex" with "gender," is the only one that makes sense in the context of subsections 703(a)(1) and (2), which prohibit discrimination against "an individual . . . , because of such individual's . . . , sex."⁴¹ The statute does not define the term "sex."

37. *E.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (disparate treatment occurs when "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin").

38. In this example, a female plaintiff could make out a prima facie case by showing that all women are excluded from the job. The burden would shift to the employer to show that the male sex is a bona fide occupational qualification (BFOQ) for the job of police officer. Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1976). If the chief is unable to show that "all or substantially all" women are incapable of performing the duties of a police officer, he will be found in violation of Title VII. See *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Weeks v. Southern Bell Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)). The *Weeks* court further posited that an employer can prove the male sex is a BFOQ by showing that nearly all women are incapable of performing the job so that it is impracticable for the employer to sift the eligible women from the ineligible. *Weeks v. Southern Bell Tel. Co.*, 408 F.2d 228, 235 n.5 (5th Cir. 1969). Of course, the employer can also rebut a prima facie case by showing that it did not differentiate between the candidates involved because of their gender, but for another reason, such as their comparative skills and their qualifications for the job. *E.g.*, *Cummings v. School Dist.*, 638 F.2d 1168 (8th Cir. 1981) (job awarded to male because of seniority, not because of gender).

39. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam).

40. MACKINNON, *supra* note 1, at 149-51, 224.

41. Civil Rights Act of 1964 § 703(a)(1)-(2), 42 U.S.C. § 2000e-2(a)(1)-(2) (1976).

Moreover, the addition of the word "sex" to Title VII of the Civil Rights Act of 1964 was accomplished without significant legislative comment.⁴² None of the Title VII bills considered in committee or introduced on the floor included a prohibition against sex discrimination; they were concerned only with racial, ethnic, and religious discrimination.⁴³ When Title VII was debated on the floor of Congress, it was, ironically, an opponent of the bill who, in an ill-fated attempt to defeat it, proposed amending section 703 to include the word "sex."⁴⁴ The bill passed, as amended, without documentation of the intended meaning of the term.⁴⁵ Neither then nor subsequently has Congress indicated that it was concerned with the problem of sexual harassment in employment when enacting Title VII.

On several occasions since 1964, however, in the course of amending Title VII, Congress has expressed its concern that women were not enjoying employment opportunities equal to those given men. When Congress amended Title VII in 1972 to give the EEOC the right to sue and to cover most federal employees,⁴⁶ the House report on the amending House bill included the following comments:

The situation of the working women is no less serious [than that of minorities]. Women currently comprise approximately 38% of the total work force of the Nation.

. . . .

Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.⁴⁷

42. See generally Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

43. *Id.* at 433-37, 442.

44. *Id.* at 439, 441-42.

45. *Id.* at 441-42.

46. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4(a), 11, 86 Stat. 104 (codified at 42 U.S.C. §§ 2000e-5 & -16 (1976)).

47. H.R. REP. NO. 238, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2137, 2140-41. The report also included the following remarks:

In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. . . .

This Committee believes that women's rights are not judicial diversifications. Discrimination against women is no less serious [than] . . . and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

Id. (footnote omitted). None of the four cases that the Committee cited in its footnote concerned sexual harassment.

Similarly wide-sweeping statements are found in the history of the 1978 amendment to Title VII, which made employment discrimination on the basis of pregnancy unlawful.⁴⁸ Senator Williams, chairman of the committee that held hearings on the bill, made the following comments on the floor of the Senate: "The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work. *The key to compliance in every case will be equality of treatment.*"⁴⁹ The last statement is true not only with regard to pregnancy discrimination cases but also with regard to all Title VII cases.

Because sex discrimination violative of Title VII must be gender-based, discrimination on the basis of sexual behavior, sexuality, or sexual preference will not always constitute disparate treatment because of sex under Title VII. If Congress had forbidden discrimination based on sexual behavior, an employer would be prohibited from, for example, firing its employees for having sexual intercourse in the company cafeteria. Because Title VII does not address sexual behavior, however, the employer is free to treat its employees as it sees fit as long as it treats both genders equally. Thus, disciplining only the women for their sexual behavior because "nice girls don't do that kind of thing" but not disciplining the men because "boys will be boys" would violate Title VII.⁵⁰

Acts of an employer dealing with an employee's sexuality likewise are not *per se* within the scope of Title VII. In a suit alleging sex discrimination under the analogous New York Human Rights Law,⁵¹ a woman complained that she had been fired from her job as a cocktail waitress at the Little Foxes Restaurant because the management felt that her bosom did not adequately fill the bodice

48. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (Supp. III 1979)).

49. 123 CONG. REC. 29385 (1977) (emphasis added). In the Senate debate of the amending Senate bill, Senator Javits remarked:

[W]e can no longer in this country legislate with regard to women workers on the basis of out-dated stereotypes and myths. The facts are that women, like men, often need employment and support families, [and] that women, like men, find their work and their careers important sources of self-esteem and personal growth.

Id. at 29387.

50. *Cf.* MACKINNON, *supra* note 1, at 195 (EEOC found Title VII violation under similar facts).

51. New York Human Rights Law § 296(1)(a), N.Y. EXEC. LAW § 296(1)(a) (McKinney Supp. 1972-1980).

of her costume.⁵² The employer, who required each waitress to use "padding in order to force the bosom to form a cleavage,"⁵³ was treating her as a sex object. Interpreting the New York law's prohibition of discrimination because of "sex" to mean because of "gender," the court held that the complainant was fired for failing to wear a properly fitting costume. The court further held that, because a male would not have been hired for the job, and therefore males were not better treated, the complainant had no cause of action for discrimination because of sex.⁵⁴

Whatever may be the moral aspects or the errors of such social concepts [as dressing women to entice male customers], the Human Rights Law does not cover this . . . "sexism". It provides only for equality of opportunity without regard to sex. Obviously the complainant was not rejected because she was female⁵⁵

Title VII's prohibition of sex discrimination likewise does not extend to discrimination between women on the basis of their bust-lines or any other facet of their sexuality.

Similarly, if an employer fires a male homosexual employee because of his sexual preference, the employer has not discriminated against him on the basis of sex under Title VII merely because his firing involved something sexual. Both the EEOC and the courts consistently have held that, absent proof that the firing was because of gender, that is, that a similarly situated female employee (a lesbian) was not or would not have been fired, there

52. State Div. of Human Rights *ex rel.* Chamberlain v. Indian Valley Realty Corp., No. CS-21209-70 (N.Y. State Human Rights Appeal Board Oct. 20, 1971), *aff'd*, 38 A.D.2d 89, 330 N.Y.S.2d 320 (1972) (per curiam), *reprinted in* M. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION 634 (1974). Compare *St. Cross v. Playboy Club*, No. CSF 22618-70 (N.Y. State Human Rights Appeal Board 1971) (female sex is a BFOQ for Playboy "bunnies") with *Guardian Capital Corp. v. State Div. of Human Rights*, 46 A.D.2d 832, 360 N.Y.S.2d 937 (hiring only sexually attractive waitresses violates state fair employment practices law in absence of a showing of direct increase in sales volume), *appeal dismissed*, 36 N.Y.2d 806, 369 N.Y.S.2d 1027 (1975). See generally 1 A. LARSON, EMPLOYMENT DISCRIMINATION §§ 15.10-.20 (rev. ed. 1980).

53. State Div. of Human Rights *ex rel.* Chamberlain v. Indian Valley Realty Corp., No. CS-21209-70 (N.Y. State Human Rights Appeal Board Oct. 20, 1971), *aff'd*, 38 A.D.2d 89, 330 N.Y.S.2d 320 (1972) (per curiam), *reprinted in* M. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION 634, 635 (1974).

54. *Id.*

55. *Id.*; cf. *Gerdorn v. Continental Airlines, Inc.*, 4 EMPL. PRAC. GUIDE (CCH) (26 Empl. Prac. Dec.) ¶ 31,921 (9th Cir. 1981) (affirming district court's finding that employer's maximum weight rules for flight attendants did not have discriminatory impact on women when only women were hired as attendants, but remanding for consideration of claim of disparate treatment as to predominantly male positions such as directors of passenger service, sales agents, and pilots). But see *id.* at 21,132 (Schroeder, C.J., concurring in part and dissenting in part) ("I would hold that whenever an employer applies a rule only to employees in a sex-segregated job classification and not to other employees, a prima facie case of discrimination has been shown.").

has been no Title VII violation.⁵⁶ The EEOC⁵⁷ and the courts⁵⁸ have used the same analysis with regard to discrimination against transsexuals.

The wisdom, cruelty, fairness, or rationality of the employer's action based on an employee's sexual preference is irrelevant: the disparate treatment theory is able to redress only inequality of treatment of the two genders.⁵⁹ Disparate treatment of employees because of their sexual preference, sexuality, sexual behavior, or other sexually-based but not gender-based criteria is not prohibited by Title VII.

III. ROLE OF THE EEOC IN THE ENFORCEMENT OF TITLE VII

Congress has assigned the EEOC a significant role in the enforcement of Title VII. The EEOC may undertake, of its own volition, investigations of employers whom it has reason to believe may be violating the Act.⁶⁰ Also, the Commission must receive individuals' charges that particular employers are violating Title VII⁶¹ and act affirmatively on charges that are not frivolous on their face.⁶² Under the streamlined procedures introduced by Ex-chairperson Eleanor Holmes Norton to reduce the EEOC's huge backlog of cases,⁶³ conciliation is usually attempted at an initial

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56. *E.g.*, *Desantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); EEOC Decision No. 77-28, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6578 (1977); EEOC Decision No. 76-75, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6495, 19 Fair Empl. Prac. Cas. 1823 (1976); EEOC Decision No. 76-67, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6493 (1976); *cf.* *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976) (EEOC's firing of homosexual did not violate his first or fifth amendment rights), *vacated & remanded*, 429 U.S. 1034 (1977). To this writer's knowledge, no sexual preference discrimination case has involved the disparate impact theory, although it would be available, for example, if a male homosexual could show that a significantly higher percentage of males than females are homosexual.
 57. *See* *Terry v. EEOC*, 25 Empl. Prac. Dec. ¶ 31,638 (E.D. Wis. 1980) (transsexual had no private cause of action against the EEOC for dismissing his sex bias charge).
 58. *E.g.*, *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047 (5th Cir. 1981); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977) (discrimination because plaintiff was transsexual was not because of sex under Title VII). *See generally* 4 A. LARSON, EMPLOYMENT DISCRIMINATION §§ 110.10, 111.00 (rev. ed. 1980).
 59. *See* *Schaulis v. CTB/McGraw-Hill, Inc.*, 496 F. Supp. 666, 670 (N.D. Cal. 1980) (no discrimination where "the alleged malfeasances of defendant afflicted both men and women equally" since "[i]t is not unlawful [under Title VII] to treat employees unfairly, if all employees are similarly treated").
 60. Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b) (1976); 29 C.F.R. § 1601.11 (1980).
 61. Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b) (1976); 29 C.F.R. § 1601.7(a) (1980).
 62. 29 C.F.R. § 1601.19(a) (1980). *But cf. id.* § 1601.12(b) (a "charge may be amended . . . , to clarify and amplify allegations made therein").
 63. *See* 42 Fed. Reg. 55,388 (1977). *See generally* A. SMITH, EMPLOYMENT DISCRIMINATION LAW 1115 (1978).

fact-finding conference.⁶⁴ If no agreement is reached between the charging party and the employer, the EEOC may conduct a further, full-scale investigation⁶⁵ and must conclude whether, in the agency's opinion, there exists reasonable cause to believe Title VII has been violated.⁶⁶

The EEOC relies on its guidelines both to determine whether the charges of discrimination are facially frivolous and to form an opinion regarding reasonable cause. In the first instance, agency action could be precluded if, under the guidelines, the claim appears to be without merit. If the claim is not frivolous under the guidelines, the EEOC will investigate the charge.

Once the EEOC undertakes an investigation, the agency often seeks to examine not only the charging party's personnel file, but also the files of other employees.⁶⁷ Complying with the discovery requests of the EEOC, such as for specially compiled statistics, is costly for the employer.⁶⁸ First, simply giving up the use of its personnel who must attend meetings with agency employees and compile the information required by the EEOC in its investigation costs the employer many hours that would otherwise be spent in productive endeavors. Second, the employer must typically hire a lawyer to negotiate the scope of discovery and to represent it in its other dealings with the EEOC. Because the meter is running on the employer's costs during the administrative proceedings, but during this period the charging party usually hires no attorney⁶⁹ and incurs no expense, the employer will often settle the com-

64. 29 C.F.R. § 1601.15(c) (1980); see *EEOC v. Associated Dry Goods Corp.*, 101 S. Ct. 817, 821 n.5 (1981). The EEOC states that the fact-finding conference is primarily an investigative forum, only one of the purposes of which is "to ascertain whether there is a basis for negotiated settlement of the charge." 29 C.F.R. § 1601.15(c) (1980). Title VII provides for the EEOC to make conciliation attempts only after its investigation and determination that there is reasonable cause to believe the charge is true. Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b) (1976).

65. Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b) (1976); 29 C.F.R. § 1601.15 (1980).

66. Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b) (1976); 29 C.F.R. § 1601.21 (1980); 45 Fed. Reg. 73,036 (1980) (to be codified in 29 C.F.R. § 1601.21(b), (d)). The EEOC may dismiss the charge, however, if the charging party fails to accept a written settlement offer that would afford him or her "full relief." 29 C.F.R. § 1601.19(e) (1980). Under a guideline effective Oct. 19, 1981, the EEOC may certify state and local agencies as ones whose findings it will automatically adopt in most cases, without any case-by-case review. 46 Fed. Reg. 50,367 (1981) (to be codified in 29 C.F.R. § 1601.75).

67. 29 C.F.R. § 1601.16 (1980). See generally 2 A. LARSON, *EMPLOYMENT DISCRIMINATION* § 48.62 (rev. ed. 1980).

68. See, e.g., Siniscalco, *Sexual Harassment & Employer Liability: The Flirtation that Could Cost a Fortune*, 6 *EMPLOYEE REL. L.J.* 277, 286 (1980); 2 *EMPL. PRAC. GUIDE* (CCH) ¶ 5186 (Jan. 1981) (summary of recommendations concerning role of EEOC to President Reagan as presented by James A. Parker, transition team leader).

69. *But see* *Parker v. Califano*, 561 F.2d 320, 332 (D.C. Cir. 1977) (charging party needs attorney at administrative level).

plaint at the EEOC level for a rather high "nuisance value," even if the charge is unfounded.

If no settlement is reached, the EEOC uses its guidelines to determine whether reasonable cause exists to believe that the employer violated Title VII. If such a finding is made, the Commission may itself sue the employer.⁷⁰ Because its resources are limited, the EEOC declines to do so in the vast majority of cases. More frequently, the charging party will bring a private suit in federal court against the employer. The charging party may sue after the EEOC has failed to conciliate within 180 days of its assuming jurisdiction over the matter, regardless of whether the EEOC has had time to make a finding concerning whether there is reasonable cause to believe Title VII has been violated, or even if the EEOC has made a finding of no such reasonable cause.⁷¹ The parties are given a trial *de novo* by the court,⁷² so that, while the EEOC's finding as to reasonable cause may be admitted into evidence, it is not in any way binding on the court.⁷³ Nonetheless, since the EEOC uses its guidelines both to determine whether a charge is facially frivolous, so as to preclude EEOC action, and to evaluate the fruits of its investigations, the guidelines play a significant part in Title VII enforcement at the agency level. Moreover, if the parties do not settle the case at the EEOC level and a court suit is filed, the EEOC guidelines may be considered by the court as persuasive authority.

Substantive regulations promulgated by the agency charged with interpreting a statute are routinely given great credence by the courts.⁷⁴ While Congress has empowered the EEOC to promulgate procedural regulations,⁷⁵ it has never given the EEOC the power to promulgate substantive regulations.⁷⁶ EEOC guidelines are so termed because they are not regulations having the force of

70. Civil Rights Act of 1964 § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976). The charging party may sue as long as he or she has requested and received a right-to-sue letter from the agency. Such requests are routinely granted. 29 C.F.R. § 1601.28 (1980); 45 Fed. Reg. 73,037 (1980) (to be codified in 29 C.F.R. § 1601.28(d)).

71. Civil Rights Act of 1964 § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976).

72. EEOC v. Western Elec. Co., 382 F. Supp. 787, 801 (D. Md. 1974).

73. *E.g.*, Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977) (trial court did not abuse its discretion in excluding agency finding); Cox v. Babcock & Wilcox Co., 471 F.2d 13 (4th Cir. 1972) (admissibility of EEOC finding is left to the trial court's discretion). *Contra, e.g.*, Smith v. Universal Serv., Inc., 454 F.2d 154, 157-58 (5th Cir. 1972) (vacating trial court's judgment and remanding with instructions *to* reconsider in light of the EEOC investigative report, which trial court had excluded).

74. See generally 4 K. DAVIS, ADMINISTRATIVE LAW §§ 30.01-.14 (1958 & Supp. 1970).

75. Civil Rights Act of 1964 § 713(a), 42 U.S.C. § 2000e-12(a) (1976).

76. General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976); EEOC v. Raymond Metal Prods. Co., 530 F.2d 590, 592-94 (4th Cir. 1976).

law.⁷⁷ Thus, while the EEOC publishes the interpretive guidelines in order to notify the public of how it feels Title VII should be interpreted and how the agency will interpret the statute in fulfilling its role, and despite the Supreme Court's frequently quoted statement that EEOC guidelines are entitled to "great deference,"⁷⁸ that Court has not felt compelled to give the guidelines as much weight as would be given to regulations promulgated under direct statutory authority. In a 1976 decision, for example, the Supreme Court rejected EEOC guidelines it found both ill-reasoned and inconsistent with a stand the EEOC had earlier taken.⁷⁹ The Court made clear that it will afford "great deference" to EEOC guidelines only if it is persuaded that the guidelines correctly interpret Title VII. Despite the Supreme Court's position, most lower courts apparently remain inclined to defer to EEOC guidelines because of the perceived expertise of the EEOC on Title VII questions.⁸⁰

IV. THE EEOC GUIDELINES ON SEXUAL HARASSMENT

A. Introduction

A plaintiff attempting to prove sex discrimination violative of Title VII must show that acts which discriminate between persons because of their gender⁸¹ have significant adverse employment ramifications⁸² and were taken either by an employer covered by Title VII⁸³ or by its agents.⁸⁴ Because Title VII is the statutory basis for the EEOC's authority to prohibit sexual harassment as a form of sex discrimination, the agency's guidelines should reflect these three criteria. Without explanation, how-

77. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 211, 301-08 (1979) (certain Office of Federal Contract Compliance Program regulations held not to amount to "law" authorizing release of information under Freedom of Information Act).

78. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

79. *General Elec. Co. v. Gilbert*, 429 U.S. 124, 142-43 (1976); *accord*, *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973) (rejecting EEOC guideline's conclusion that discrimination because of citizenship is necessarily because of national origin); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 25 Empl. Prac. Dec. ¶ 31,552 (E.D. Va. Jan. 26, 1981) (rejecting, as contrary to law, EEOC guidelines that provide that employer must offer pregnancy benefits for male employees' spouses if it offers medical benefits for female employees' spouses), *order amended on other grounds*, 25 Empl. Prac. Dec. ¶ 31,679 (E.D. Va. Feb. 25, 1981); *cf. Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) (rejecting EEOC procedural regulation which allowed filing under § 706(e) during, rather than after, the deferral period provided for state and local § 706(e) agencies).

80. *E.g., Kohne v. Imco Container Co.*, 480 F. Supp. 1015, 1032 (W.D. Va. 1979).

81. See notes 29, 32-59 and accompanying text *supra*.

82. Civil Rights Act of 1964 § 703(a)(1)-(2), 42 U.S.C. § 2000e-2(a)(1)-(2) (1976).

83. *Id.* § 701(b), 42 U.S.C. § 2000e(b).

84. *Id.*

ever, the sexual harassment guidelines fail to require a showing of discrimination between males and females. Further, the guidelines set forth broad definitions of the conduct that is actionable and of the employer's liability for conduct by third persons.⁸⁵ At an extreme, they could be read to make an isolated sexual comment, aimed at men and women alike and inflicting little or no harm upon an employee, actionable⁸⁶ even if it were made by a non-agent of the employer.⁸⁷

The EEOC has promised that it will clarify the broad language of the guidelines through Commission decisions⁸⁸ and will make "no attempt to unfairly prosecute" employers.⁸⁹ Moreover, the guidelines provide that

[i]n determining whether alleged conduct constitutes [illegal] sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.⁹⁰

The EEOC's initial post-guideline opinions have helped to shed some light on the intended meaning of the guidelines.

B. Gender-Based Discrimination

The EEOC guidelines define the types of harassing acts which amount to sex discrimination under Title VII as follows:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁹¹

85. See 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a), (e)).

86. See notes 181-82, 195-97 and accompanying text *infra*.

87. See notes 255-58 and accompanying text *infra*.

88. 45 Fed. Reg. 74,676 (1980).

89. Olson, *Sexual Harassment Rules Opposed*, The Sun (Baltimore), Oct. 13, 1980, at A12, col. 6.

90. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(b)).

91. *Id.* (to be codified in 29 C.F.R. § 1604.11(a)). This definition, as well as other parts of the guideline, is adopted by the Office of Federal Contract Compliance Programs in its proposed regulations concerning the programs of federal contractors. 46 Fed. Reg. 42,986 (1981) (if adopted, to be codified in 41 C.F.R. § 60-1.25).

The EEOC seems to equate the phrase in the first sentence referring to "[h]arassment on the basis of sex" under Title VII with the term "sexual harassment" in the second sentence.⁹² The supplementary information, published by the agency to accompany the interim guidelines, which used the same language, supports this conclusion. In saying there that sexual harassment, "like harassment on the basis of color, race, religion, or national origin, has long been recognized by EEOC as a violation of Section 703 of Title VII,"⁹³ the agency in effect substituted the word "sexual," in the sense of sexual intercourse or physical sexual attributes of men and women, for the statutory word "sex."⁹⁴ The EEOC's apparent equation of "sex" with "sexual" in its lascivious sense is unsupported by the legislative history of Title VII, which contains no reference to problems arising because of sexual harassment or sexual behavior of any kind in the workplace.⁹⁵ Congress expressed concern only with the types of jobs women held and the lower pay they received; its stated goals were of equal employment opportunity for similarly qualified males and females.⁹⁶

The guideline's apparent equation of "harassment on the basis of sex" and "sexual harassment" says both too little and too much. Sex-based harassment under Title VII would include all harassment, whether sexual or not, of an employee because of his or her gender.⁹⁷ Thus, the guideline is underinclusive in its apparent overlooking of the possibility of non-sexual but gender-based harassment. On the other hand, it is overinclusive to the extent that it covers possible cases of sexual but non-gender-based harassment.

1. How the Guideline is Underinclusive

The application of the canon of construction "*expressio unius est exclusio alterius*" or "the expression of one is the exclusion of the other" gives rise to the inference that the EEOC finds sexual

92. This problem could have been avoided by stating that harassment on the basis of sex includes but is not limited to sexual harassment.

93. 45 Fed. Reg. 25,024 (1980). With regard to the interim guidelines, see note 18 *supra*.

94. The statute simply provides that employers may not discriminate against individuals "because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964 § 703(a)(1)-(2), 42 U.S.C. § 2000e-2(a)(1)-(2) (1976). For a discussion of the legislative intent in including "sex" as a classification in Title VII, see notes 42-49 and accompanying text *supra*.

95. See notes 42-49 and accompanying text *supra*.

96. See notes 47-49 and accompanying text *supra*.

97. See notes 32-39 and accompanying text *supra*.

harassment actionable, but finds non-sexual harassment directed at one because of one's gender not violative of Title VII. But harassment because of gender is limited by only the imagination of the harasser and is not confined to sexual harassment. For example, women have been harassed because of their gender by such non-sexual acts as smashing their car headlights.⁹⁸ Sexist but non-sexual harassment may also be directed at women because of their gender, as when a supervisor continuously calls a female employee a "dumb broad" and asks her, "Why aren't you women home where you belong?"⁹⁹ The courts have recognized that a woman who is non-sexually harassed because she is a woman is no less discriminated against because of her sex than a woman who is sexually harassed because of her gender.¹⁰⁰

The EEOC should amend this guideline to make it clear that it views sexual harassment as only one of the actionable types of gender-based harassment. Without such an amendment, the agency may fall deeper into the trap it has created. Already, in a post-guideline sexual harassment decision, the EEOC has stated that a supervisor's "use of profane language of a non-sexual nature in the workplace does not constitute sexual harassment. Although that language may have been unwanted or offensive to the Charging Parties [who were all female], it would not constitute sexual harassment if it was not of a sexual nature."¹⁰¹ The facts of this particular case showed that some male employees were also exposed to the same language.¹⁰² It is important to note, however, that the EEOC stated that the language was not sexually harassing because it was not sexual, and not because it affected employees of both genders. Further, the EEOC did not take this opportunity to point out that any harassment directed at females because they were women would be "because of sex" under Title VII.

98. *Continental Can Co. v. Minnesota*, 297 N.W.2d 242, 244 (Minn. 1980); cf. *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126 (N.D. Ohio 1976) (woman's car tires were slashed and she was otherwise harassed by her co-workers because of her interracial marriage).

99. See *MACKINNON*, *supra* note 1, at 42-43 ("photo-finishing girl" was harassed because of her gender, not only in a sexual context, but also in a non-sexual context by comments that women "can't be relied upon" and "don't know which end of a camera is up").

100. *E.g.*, *Continental Can Co. v. Minnesota*, 297 N.W.2d 242 (Minn. 1980).

101. EEOC Decision No. 81-18, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6758, at 4809 (Apr. 3, 1981).

102. See *id.* at 4808.

2. How the Guideline is Overinclusive

By failing to require an initial finding of disparate treatment of employees of opposite sexes, the guideline would also make actionable sexual harassment that is directed at an employee for some reason other than his or her gender. The guideline's definition of sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"¹⁰³ reflects a position that such conduct is *per se* gender-based. The types of conduct which the guideline describes as sexual harassment, however, need not be directed toward an employee because of his or her sex. For example, verbal conduct of a sexual nature,¹⁰⁴ if directed at and affecting both male and female employees, would appear to be actionable under the guidelines, although it would not be discriminatory under Title VII.¹⁰⁵

The first three post-guideline EEOC decisions do not make it clear whether the agency recognizes that Title VII, under the disparate treatment theory, requires a comparison of the treatment of males and females. Using identical language in all three decisions, the EEOC stated: "The Commission and the courts have recognized that sexual harassment is gender based discrimination which violates Title VII, and that, where sexual considerations are applied to one gender and not to the other, a case of sex discrimination based on disparate treatment is established."¹⁰⁶ If the two clauses of this statement are read independently, it describes alternative forms of sex discrimination: sexual harassment, which is held to be *per se* gender-based, and disparate treatment. If, on the other hand, the EEOC intended the two clauses to be read together, the statement says that sexual harassment and disparate treatment would be necessary to prove sexual harassment violative of Title VII.

103. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).

104. *See id.*

105. *Cf. Bradford v. Sloan Paper Co.*, 383 F. Supp. 1157, 1161 (N.D. Ala. 1974) (acts of quick-tempered supervisor who was equally hard on all employees, regardless of their race, did not violate Title VII).

106. EEOC Decision No. 81-18, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6758, at 4807 (Apr. 3, 1981) (footnote omitted); EEOC Decision No. 81-17, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6757, at 4798 (Feb. 6, 1981) (footnote omitted); EEOC Decision No. 81-16, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6756, at 4796 (Jan. 26, 1981) (footnote omitted). In two of the three decisions, the Commission compared treatment of men and women or pointed out that there were no similarly situated employees. *See* EEOC No. 81-18, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6758, at 4808 (Apr. 3, 1981); EEOC Decision No. 81-17, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6757, at 4799 (Feb. 6, 1981). In its third decision, however, the EEOC stated that if a male charging party's male supervisor had laid off the charging party for rejecting unwanted sexual advances, the Commission would find a Title VII violation. EEOC Decision No. 81-16, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6756, at 4796-97 (Jan. 26, 1981). The Commission did not discuss the possibility that female employees might have been similarly situated.

Of the two interpretations, only the second has a legitimate basis in the law. It is supported by the EEOC's statement in one post-guideline decision that "a discriminatory practice is unlawful where it occurs because an individual is male or female."¹⁰⁷ Moreover, case authority recognizes that Title VII requires such a showing of disparate treatment. For this reason the recent EEOC decisions should be read to require disparate treatment in sexual harassment cases, and future decisions should clarify this point.

3. Sexual Harassment and Disparate Treatment

If an individual is harassed, but not because of his or her race, color, gender, religion, or national origin, there is no discrimination under Title VII.¹⁰⁸ Two situations in which harassment occurs would therefore not be actionable: (1) if it were directed at one person for personal, rather than class-based, reasons;¹⁰⁹ (2) if it were or would be directed at all similarly situated employees, regardless of their class membership.¹¹⁰ With regard to the first instance, as one court explained: "The fact that an individual is harassed occasionally because he is unconventional and unduly sensitive or a hypochondriac, or because he does not have a sense of humor, or because people do not like him is not cognizable under the Civil Rights Act."¹¹¹ Similarly, for example, in order to make out a *prima facie* case of illegal racial harassment, the plaintiffs must show that they were harassed and that employees of another race were not. If, instead, the evidence shows that employees of both races were treated equally harshly, it has been held that there is no racial discrimination under Title VII.¹¹²

The courts have used the same approach in sexual harassment cases. *Williams v. Saxbe*,¹¹³ the first Title VII case to find sexual harassment actionable, is typical. The plaintiff had alleged that,

107. EEOC Decision No. 81-16, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6756, at 4796 (Jan. 26, 1981).

108. See Civil Rights Act of 1964 § 703(a)(1)-(2), 42 U.S.C. § 2000e-2(a)(1)-(2) (1976); notes 58 & 59 *supra*.

109. Thus, adverse action taken by an employer against an employee because of a personality clash, rather than because of the employee's gender, is not violative of Title VII. *Barding v. Board of Curators*, 457 F. Supp. 1013 (W.D. Mo. 1980).

110. See notes 32-34 and accompanying text *supra*.

111. *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177, 1185 (W.D. Pa. 1973).

112. *Croker v. Boeing Co.*, 437 F. Supp. 1138, 1195 (E.D. Pa. 1977), *aff'd*, 4 EMPL. PRAC. GUIDE (CCH) (27 Empl. Prac. Dec.) ¶ 32,160 (3d Cir. Sept. 30, 1981); see *Bradford v. Sloan Paper Co.*, 383 F. Supp. 1157, 1161 (N.D. Ala. 1974) (acts of quick-tempered supervisor who was equally hard on all employees, regardless of their race, did not violate Title VII).

113. 413 F. Supp. 654 (D.D.C. 1976), *rev'd & remanded on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *decision on remand sub nom. Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980).

because she refused her supervisor's sexual advance, he wrongfully reprimanded her, refused to inform her of her job responsibilities, refused to consider her recommendations, and ultimately fired her from her job with the Justice Department.¹¹⁴ In denying the defendant's motion to dismiss, Judge Richey of the United States District Court for the District of Columbia concluded that, unless the supervisor in question were "a bisexual and applied this criteria to both genders," the allegations showed that the plaintiff had been discriminated against because of her gender.¹¹⁵ The test is whether a similarly situated person of the opposite sex was or would have been similarly harassed.

114. *Id.* at 655-56. Interestingly, responses to a federal survey indicate that, among federal agencies, the Department of Justice, the Department of Labor, and the Department of Transportation have the highest incidence rates of sexual harassment of women. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 6, 47.

115. 413 F. Supp. 654, 659 n.6 (D.D.C. 1976), *rev'd & remanded on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *decision on remand sub nom. Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980); *accord, Barnes v. Costle*, 561 F.2d 983, 989 & n.49 (D.C. Cir. 1977); *Neidhardt v. D.H. Holmes Co.*, 21 Fair Empl. Prac. Cas. 452, 468 (E.D. La. 1979). *See generally* Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 136 & n.62 (1977). *But see Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (to hold that sexual harassment of women violated Title VII would lead to the "ludicrous" result that if men were similarly harassed there would be no basis for suit), *vacated & remanded mem.*, 562 F.2d 55 (9th Cir. 1977); *cf. Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (sexual harassment of woman by male supervisor not violative of Title VII because "[t]he gender lines might as easily have been reversed, or even not crossed at all"), *rev'd & remanded*, 568 F.2d 1044 (3d Cir. 1977).

In denying the motion to dismiss in *Williams v. Saxbe*, the judge made the problematic comment that the plaintiff's allegation "that the supervisor's conduct was a policy or practice imposed on the plaintiff and other women similarly situated . . . [was] an essential allegation for presenting a cause of action." 413 F. Supp. at 660 n.8 (emphasis added). The *Williams* plaintiff would therefore have to prove that she had been required to choose between providing sexual favors or being fired and that other women had also been given the same choice, thereby indicating that the supervisor had an ongoing policy of sexual extortion. The court's statement was in reaction to the defendants' argument that, unless the complaint were dismissed, "the courts [would] become embroiled in sorting out the social life of the employees of numerous federal agencies." *Id.* at 660.

The opinion could be read to mean that unless more than one woman were victimized, the harassment was not because of gender but perhaps because of her personality or because of "chemistry" between her and the supervisor. Yet, if sexual harassment by a supervisor of one female employee and not of a similarly situated male employee is because of "sex," it remains so regardless of whether the supervisor also harasses other female employees. In recent cases, the courts have rejected any intimation to the contrary in *Williams*. *Barnes v. Costle*, 561 F.2d 983, 993-94 (D.C. Cir. 1977); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 467 (E.D. Mich. 1977); *see Note, Sexual Harassment & Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1024-25 (1978) [hereinafter cited as *Sexual Harassment & Title VII*]. These decisions are consistent with other Title VII cases. In no other situation must an individual Title VII plaintiff prove that others were discriminated against also. Evidence concerning others may be relevant to counter a defendant's argument that adverse action was taken against the plaintiff for some reason other than gender, race, color, religion, or

This gender-based test also determines whether conduct involving sexuality, sexual behavior, or sexual preference violates Title VII, as is illustrated by two recent federal district court decisions. In *Halpert v. Wertheim & Co.*,¹¹⁶ the United States District Court for the Southern District of New York found no Title VII sex discrimination when the plaintiff, other women, and men were subjected to co-workers' extensive and explicit sexual cursing. Another district court found actionable sexual harassment when an employer sought sexual favors of a male homosexual employee, because the employer would not have sought such favors of a lesbian.¹¹⁷

It is tempting to think that this requirement of comparing similarly situated males and females is, in a word, silly. After all, only a few men have filed charges of sexual harassment;¹¹⁸ it would seem to be almost exclusively a women's problem. There will be very few, if any, cases in which both males and females are equally sexually harassed. Yet the fact that meeting the requirement will be almost always pro forma does not justify the EEOC's exceeding its delegated powers by omitting that threshold step. On the contrary, it shows that observing the statute's boundaries will

national origin. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-05 (1973); *Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439, at 18,542 n.18 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981); *Taylor v. American Wholesalers, Inc.*, 17 Empl. Prac. Dec. ¶ 8618, 17 Fair Empl. Prac. Cas. 1586 (D. Md. 1978). But see, e.g., *Vinson v. Taylor*, 22 Empl. Prac. Dec. ¶ 30,708, at 14,693 n.1, 23 Fair Empl. Prac. Cas. 37, 38 n.1 (D.D.C. 1980) (plaintiff's testimony regarding boss's advances to women other than plaintiff admitted without objection in plaintiff's case in chief).

116. 24 Empl. Prac. Dec. ¶ 31,243 (S.D.N.Y. 1980).

117. *Wright v. Methodist Youth Servs., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981). A survey by *Impact Journal* showed that 11% of the incidents reported involved harassment of a woman by a woman. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at G-3.

118. See EEOC Decision No. 81-16, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6756 (Jan. 26, 1981) (charging party's allegation that he was laid off because he rejected his male supervisor's sexual advances was found to be unsupported by the evidence); Tybor, *A Homosexual Advance Leads to a Federal Case*, Nat'l L.J., Apr. 6, 1981, at 3, col. 2 (discussing *Wright v. Methodist Youth Servs., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981), in which the court denied defendant's motion to dismiss a Title VII claim where plaintiff alleged he was fired for rejecting homosexual supervisor's advances; court reasoned that plaintiff would not have been approached had he been a female); *Sexual Harassment by Woman Alleged*, The Sun (Baltimore), Dec. 17, 1980, at A3, col. 3. See also 1 A. LARSON, EMPLOYMENT DISCRIMINATION § 41.62, at 8-104 & n.29 (rev. ed. 1980).

In a government survey released in September 1980, approximately 15% of the male federal employees polled complained of sexual harassment. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 3. One writer has asserted that, because of sex roles, "[b]eing sexually subjected could be argued to be a woman's experience, whether the victim is a man or a woman." MACKINNON, *supra* note 1, at 229-30 n.13, 147. There is some indication that men, more so than women, are flattered by sexual advances, but other evidence indicates that men are more uncomfortable, because of the sex role reversal, when they are pressured for dates. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 23.

hurt only negligibly the EEOC's enforcement efforts against sexual harassment. No doubt fewer cases would go unredressed under Title VII as a result of requiring a male-female comparison than do now because of the statute's nonapplication to employers having fewer than fifteen employees.¹¹⁹ The only way legitimately to circumvent the limitations imposed by Title VII is for Congress to amend the statute.¹²⁰

4. Disadvantage of Some Employees Because of Others' Willingness to be Sexually Harassed

In a rather curious provision of the new guidelines, the EEOC again failed to require a comparison of the treatment of males and females. The provision concerns the question that arises when someone other than the charging party complies with an employer's sexual advance and receives favorable attention, such as a promotion, in return. The EEOC has described this question as "not . . . an issue of sexual harassment in the strict sense, [but] . . . a related issue which would be governed by general Title VII principles."¹²¹ Specifically, the guideline provides that "[w]here employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for, but denied that employment opportunity or benefit."¹²² The EEOC again seems to interpret Title VII's reference to the term "sex" to mean something sexual affecting an individual rather than an individual's gender.

No cases have addressed the question, but it seems clear that if the compliant employee is female and the boss is a heterosexual male, a male co-worker who would otherwise have received the promotion has been denied an employment opportunity because of

119. Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (1976).

120. The EEOC has made the same error of failing to require that there be prohibited class-based discrimination in its proposed guidelines on national origin harassment. These guidelines do not require a plaintiff to show that similarly situated people of another national origin are not likewise harassed. See 45 Fed. Reg. 85,637 (1980) (to be codified in 29 C.F.R. § 1606.8(a)). The guidelines repeat much of the language of the sexual harassment guidelines. The major difference is that they define illegal harassment as "[e]thnic slurs and other verbal or physical conduct relating to an individual's national origin." *Id.* (to be codified in 29 C.F.R. § 1606.8(b)). When publishing the sexual harassment guidelines, the EEOC was careful to point out that "[t]he principles involved here continue to apply to race, color, religion, or national origin." *Id.* at 74,677 n.1.

121. *Id.* at 74,677.

122. *Id.* (to be codified in 29 C.F.R. § 1604.11(g)).

his gender.¹²³ If the co-worker is female, however, she has not been discriminated against because of her gender when the other woman is promoted.¹²⁴ The female co-worker has no standing to complain¹²⁵ of sex discrimination.¹²⁶ An employer's use of sexual criteria does not, as the EEOC intimates, *per se* violate Title VII.

5. Probable Supreme Court Reaction

It is unlikely that the EEOC's omission from the sexual harassment guidelines of a requirement of comparison between similarly situated males and females will be followed by the Supreme Court. The 1976 case, *General Electric Co. v. Gilbert*,¹²⁷ involved a similar threshold question: were female employees discriminated against because of their sex when denied employer-provided temporary disability insurance for all disabilities occurring during pregnancy (even if unrelated to pregnancy), while male

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123. It has been argued that this would be the result even if the women rejected the opportunity because men were denied that chance. *Sexual Harassment & Title VII*, *supra* note 115, at 1032. But one has to doubt whether, when Congress mandated equal employment opportunity for both sexes, it meant equal opportunity to advance oneself by entering into sexual liaisons.
124. *Cf. United States v. N.L. Indus., Inc.*, 479 F.2d 354, 373 (8th Cir. 1973) (a black replaced by a black cannot successfully argue that he has been discriminated against because of race); *Wade v. New York Tel. Co.*, 500 F. Supp. 1170, 1176 (S.D.N.Y. 1980) (black female plaintiff alleging racial and sex discrimination in her firing failed to show that she was replaced by or treated differently than someone of a different race or sex). *Contra*, *MACKINNON*, *supra* note 1, at 197. This reasoning applies to disparate treatment rather than disparate impact cases. See notes 34-38 and accompanying text *supra*. Of course, the fact that only a specifically defined subclass of females is disparately treated does not excuse the discrimination if it is gender-based. *E.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*).
125. *But cf.*, *e.g.*, *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70 (9th Cir.) (white plaintiff's right to nondiscriminatory environment gives her standing to complain of discrimination against blacks and Hispanics), *cert. denied*, 433 U.S. 915 (1977); EEOC Decision No. 81-17, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6757, at 4799 (Feb. 6, 1981) (*dicta*) (employer's affirmative duty to maintain a discrimination-free environment "extends not only to those workers subjected to harassment, but also to those workers affected by the harassment of others"); *Sexual Harassment & Title VII*, *supra* note 115, at 1024 (sexual harassment damages all employees in the office); Note, *Work Environment Injury Under Title VII*, 82 YALE L.J. 1695, 1695 (1973) ("discriminatory practices directed at one group taint the work environment and thereby cause injury to all employees").
126. *But see Skelton v. Balzano*, 424 F. Supp. 1231, 1235 (D.D.C. 1976) (female plaintiff was discriminated against because of sex even though another woman obtained the promotion in question, because "if plaintiff had been a man she would not have been treated in the same manner"). Nor may a defendant who has illegally fired one individual because of gender simply immunize itself from liability by replacing that individual with another of the same gender. See *Vant Hul v. City of Dell Rapids*, 462 F. Supp. 828, 832-33 (D.S.D. 1978) (ultimate replacement of female plaintiff by another woman had "minimal" relevance to plaintiff's sex discrimination claim); *cf. Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 470 (N.D. Cal. 1978) (evidence that black plaintiff was replaced by a black may not alone rebut a *prima facie* showing of discrimination but it supports a finding of a nondiscriminatory purpose).
127. 429 U.S. 125 (1976).

employees were covered for all temporary disabilities? Although EEOC guidelines stated that such discrimination because of pregnancy was illegal sex discrimination, the Supreme Court held that there was no sex discrimination, because similarly situated (non-pregnant) females and males were treated alike.¹²⁸ The Court thus compared the treatment of men and women, even though the case concerned the unique feminine attribute of the ability to become pregnant. It held that the EEOC guidelines in question were ill-reasoned¹²⁹ and declared that any deference due EEOC guidelines is lessened when the agency's position has vacillated, as it had with regard to the pregnancy-based discrimination issue.¹³⁰

By making no provision in the guidelines that the treatment of similarly situated males and females be compared, the EEOC deviates from its position in its homosexual and transsexual discrimination decisions¹³¹ and from the courts' unanimous agreement¹³² that the word "sex" in Title VII means gender as opposed to sexuality or carnality. Neither has found illegal sex-based action without first discerning that there has been gender-based discrimination: that similarly situated men and women are or would

128. *Id.* at 133-40. The classification was not one of sex but one between "two groups — pregnant women and nonpregnant persons. While the first group [was] exclusively female, the second include[d] members of both sexes." *Id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974)). In reaching this result, the Court rejected the plaintiffs' argument that it was "the ability to become pregnant" from which employment discrimination against women historically flowed. *Id.* Arguably, the Court retreated from this position in *Satty v. Nashville Gas Co.*, 434 U.S. 136 (1977), where the majority held that certain types of discrimination against pregnant women violated Title VII because they had the effect of denying pregnant women employment opportunity because of their sex.

129. 429 U.S. 125, 143-45 (1976).

130. *Id.* at 142-43. This language in *Gilbert* may account for the EEOC's statement in the supplementary information published with the interim sexual harassment guidelines that "[s]exual harassment like harassment on the basis of color, race, religion, or national origin, has long been recognized by EEOC as a violation of Section 703 of Title VII of the Civil Rights Act of 1964, as amended." 45 Fed. Reg. 25,024 (1980). The EEOC's assertion is supported by, for example, its filing of an amicus curiae brief in support of the plaintiff-appellant in *Corne v. Bausch & Lomb, Inc.*, 562 F.2d 55 (9th Cir. 1977) (mem.). 51 N.Y.U. L. REV. 148, 153 n.25 (1976). The Court's emphasis in *Gilbert* on the EEOC's inconsistency may well have contributed to the EEOC's refusal to revise the sexual harassment guidelines concerning acts of supervisors and agents. See text accompanying notes 224-25 *infra*. No doubt for the same reason, the EEOC makes a prefatory statement in its guidelines on national origin discrimination that "[t]he Commission has consistently held that harassment on the basis of national origin is a violation of Title VII." 45 Fed. Reg. 85,636 (1980) (to be codified in 29 C.F.R. § 1606.8(a)).

131. See notes 56 & 57 and accompanying text *supra*.

132. See notes 51-59 and accompanying text *supra*.

have been treated unequally.¹³³ The EEOC's equation in the sexual harassment guidelines of sex with sexual behavior, regardless of whether the employer's conduct is aimed equally at males and females, is therefore logically inconsistent with the Supreme Court's reasoning in *Gilbert* and with lower courts' sexual harassment decisions.¹³⁴ Moreover, it is inconsistent with the earlier EEOC pronouncements concerning discrimination against homosexuals and transsexuals.¹³⁵ Such an inconsistency, as the Supreme Court pointed out in *Gilbert*, detracts from the persuasiveness of EEOC guidelines. After *Gilbert*, when Congress amended Title VII to explicitly prohibit discrimination based on pregnancy,¹³⁶ it did not take that opportunity to say that the Supreme Court was incorrect in comparing, in disparate treatment cases, the treatment of men and women. Without a specific

133. *But see* MACKINNON, *supra* note 1, at 6, 203. MacKinnon finds this disparate treatment theory, which she describes as a "differences" approach, inadequate when dealing with sexual harassment. She reasons that under this approach Title VII probably would not be violated if both men and women were sexually harassed. *Id.* MacKinnon also finds the disparate impact theory (see note 36 *supra*) inadequate, although it is conducive to her suggested theory, which she terms the "inequality" approach. *Id.* at 102. Women and men are not equal, MacKinnon argues, because of the culturally enforced inferiority of women. *Id.* at 4-5, 102, 116-18. Further, men have much more power in employment than do women. *See id.* at 9, 31, 92. MacKinnon notes that sexual harassment is widespread and its "perpetrators tend to be men, the victims women." *Id.* at 26-28. Because sexual harassment of women "integrally contributes to the maintenance of an underclass or a deprived position" based on gender, such harassment would be *per se* actionable under the inequality theory. *Id.* at 117, 174-82, 215-21, 231. Although no court has applied MacKinnon's inequality approach, her book was cited for another proposition in *Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439, at 18,534 (D.C. Cir. Jan 12, 1981).

Two theories, found by MacKinnon to be inadequate, have promise. One is the theory that sexual harassment of a woman violates Title VII because it is discrimination based on a sex stereotype. *See* MACKINNON *supra* note 1, at 178-82. There is dicta supportive of this approach. *See* *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"), *cert. denied*, 404 U.S. 991 (1971); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (D. Colo. 1978) (referring to "stereotype of the sexually-accommodating secretary"); *cf.* 51 N.Y.U. L. REV. 148, 158-59 (1976) (the "supervisor who makes repeated sexual advances to his female employees . . . reinforces the traditional stereotype of women as the submissive sex").

The second approach is the disparate impact theory. *See* note 36 *supra*. If an employer sexually harasses all employees, male and female alike, but female employees far outnumber similarly situated males or are reasonably more deeply affected by the harassment, the affected females could argue that the sexual harassment has a disparate impact on them. *See* MACKINNON, *supra* note 1, at 66, 183-84, 203, 206-08. The EEOC does not state in its guidelines under which, if any, of these theories it feels sexual harassment violates Title VII.

134. *See* notes 113-15, 127-30 and accompanying text *supra*.

135. *See* notes 56 & 57 and accompanying text *supra*.

136. *See* note 48 and accompanying text *supra*.

provision,¹³⁷ such as the pregnancy amendment, exempting a particular type of discrimination from that analysis, the Court can be expected to continue to compare treatment of the two genders. If the requirement of a showing by a Title VII sexual harassment plaintiff that similarly situated persons of the opposite sex were not also harassed is felt to be Draconic, Congress can amend Title VII so as to provide that sexual harassment is *per se* violative of Title VII.

C. *Significant Adverse Employment Ramifications*

1. Harm to the Employee

In addition to proving that persons of the opposite sex were not similarly treated, the Title VII plaintiff must also show that the discrimination had significant adverse employment ramifications for him or her. To prove discrimination violative of subsection 703(a)(1) of the Act, the plaintiff must show that the discrimination occurred as a failure to hire or as a discharge or it otherwise affected his or her "compensation, terms, conditions, or privileges of employment."¹³⁸ To prove discrimination violative of subsection 703(a)(2), the plaintiff must show that the discrimination manifested itself in his or her being limited, segregated, or classified so as to deprive or tend to deprive the plaintiff of "employment opportunities or otherwise adversely affect his status as an employee."¹³⁹ With regard to this element, the guidelines provide that sexual harassment is covered by Title VII if one of the following applies:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹⁴⁰

The first clause merely paraphrases the statutory language of subsection 703(a)(1)¹⁴¹ without elucidating it.

The second clause, which provides that the EEOC would find a Title VII violation when an employee's reaction to sexually

137. One author has suggested that statutes might be amended to prohibit discrimination based on "sexuality," which may include sexual preference, as well as "sex." MACKINNON, *supra* note 1, at 190.

138. Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976).

139. *Id.* § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2).

140. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).

141. See note 27 *supra*.

harassing conduct is used as the basis for employment decisions affecting the employee,¹⁴² restates the rationale of well-reasoned judicial interpretations of the statutory language of section 703(a)(2).¹⁴³ For example, a Title VII plaintiff who can show that he or she was not hired or was fired in retaliation for spurning a supervisor's advances can easily meet this element of significant adverse employment ramifications.¹⁴⁴ A demotion or a denial of a deserved promotion in retaliation for rejection of sexual overtures would also clearly fit within the statutory scheme.¹⁴⁵ Similarly, when harassment of an employee because of his or her gender becomes so intolerable that a reasonable employee¹⁴⁶ quits his or

142. The use of the plural "decisions" in the guideline, rather than the singular "decision," appears to be the result of an oversight. One decision, such as the decision to terminate an employee, would clearly suffice. *E.g.*, *Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977) (per curiam).

143. *See Fisher v. Flynn*, 598 F.2d 663, 666 (1st Cir. 1979) ("the romantic overtures" by the department chairman to the plaintiff, an assistant professor, "were but an unsatisfactory personal encounter with no employment repercussions and consequently not actionable"); *Barnes v. Costle*, 561 F.2d 983, 989-90 n.49 (D.C. Cir. 1977) (in finding abolition of plaintiff's job because she rejected her supervisor's advances actionable, the court pointed out that the facts before it were "very different from instances of sexual affairs between . . . employees which are not tied to employment opportunity in any way"); *Clark v. World Airways, Inc.*, 24 Empl. Prac. Dec. ¶ 31,385 (D.D.C. 1980) (no liability for sexual advances, offensive remarks, and touching of plaintiff by boss with whom plaintiff did not work directly and who neither threatened to nor did retaliate against her for her rejection of the advances) (decided before *Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981), discussed at notes 159-70 and accompanying text *infra*).

144. *E.g.*, *Williams v. Saxbe*, 413 F. Supp. 654, 655 (D.D.C. 1976), *rev'd & remanded on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *decision on remand sub nom. Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980).

145. *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 (3d Cir. 1977); *Rinkel v. Associated Pipeline Contractors, Inc.*, 16 Empl. Prac. Dec. ¶ 8331, 17 Fair Empl. Prac. Cas. 224 (D. Alaska 1978).

146. The cases require that the plaintiff act reasonably. *E.g.*, *Clark v. World Airways, Inc.*, 24 Empl. Prac. Dec. ¶ 31,385 (D.D.C. 1980). The United States Court of Appeals for the First Circuit has held, in a case involving alleged race discrimination, that a black plaintiff who was discharged for absenteeism must show, in order to prevail, a "proper excuse" for staying off the job "such as fear for personal safety, reasonably based" on the threatening and harassing conduct of his co-workers. *DeGrace v. Rumsfeld*, 614 F.2d 796, 806 (1st Cir. 1980) (emphasis added). In *DeGrace*, the court added that "[w]hile due allowance must be made for plaintiff's fear and hostility, he too had to act reasonably to bring matters to [his employer's] attention, to communicate his position, and to cooperate with or at least not impede [its] good faith efforts to correct the situation." *Id.* (emphasis added); *see Wright v. Allis-Chalmers*, 496 F. Supp. 349 (N.D. Ala. 1980) (black plaintiff could be properly fired for assaulting supervisor even if the assault was occasioned by the supervisor's racial epithet); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381 (D. Minn. 1980) (self-help disfavored); *cf. Note, Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 HARV. WOMEN'S L.J. 173, 192 (1980) (objective standard of reasonableness applied to determine whether unemployment compensation claimant had good cause to leave job).

her job, the courts should have no difficulty in finding that the employee has been "constructively discharged" and has a cause of action under Title VII.¹⁴⁷

The cases and the EEOC decisions are clear, however, that "a nonemployment related personal encounter,"¹⁴⁸ even between an employee and his or her supervisor, is not by itself actionable. The EEOC has explained its position: "We simply do not share that particularly jaundiced view of human nature that every sexual advance contains an implied threat that non-compliance will bring forth employment retaliation."¹⁴⁹ In one court case, an assistant professor at a college alleged that she had been fired after rejecting a superior's advance, but she failed to show any causal connection between the two events or even that the man in question had played a role in her firing.¹⁵⁰ She was held not to have stated a cause of action under Title VII.

The third clause of the guideline provides that sexual harassment is illegal under Title VII when it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."¹⁵¹ This language reflects the EEOC's adoption of the statements of a few courts and several commentators that Title

147. *Cf. Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (constructive discharge because of atheism was illegal religious discrimination); *Hayden v. Chrysler Corp.*, 486 F. Supp. 557 (E.D. Mich. 1980) (employer found responsible for constructive discharge resulting from on-the-job racial harassment which was intended to make it impossible for plaintiff to stay on the job). *Contra, Shanks v. Harrington*, 21 Fair Empl. Prac. Cas. 590 (W.D. Iowa 1979) (alternative holding) (plaintiff, who alleged she had quit her job because of supervisor's repeated advances, made to her because of her sex, had no Title VII cause of action); *cf. EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 388 (D. Minn. 1980) (self-help by harassed employee disfavored when legal remedy available).

Twenty-six of the 130 sexual harassment charges sent to the EEOC's national headquarters since publication of the sexual harassment guidelines were filed by "women who quit when 'unwelcome sexual activity became intolerable.'" N. Y. Times, Apr. 22, 1981, at C8, col. 1 (quoting J. Clay Smith, Jr., Acting Commissioner of the EEOC).

148. *Williams v. Saxbe*, 413 F. Supp. 654, 655 (D.D.C. 1976), *rev'd & remanded on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *decision on remand sub nom. Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980). Sexual attraction between co-workers is, after all, common. *See Wall St. J.*, Apr. 14, 1981, at 1, col. 6 ("some men find that the office is a little too exciting with women as peers"). *See also* EEOC Decision No. 81-18, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6758, at 4807-08, 4809 (Apr. 3, 1981).

149. *MACKINNON*, *supra* note 1, at 258-59 n.69 (quoting EEOC brief on appeal from *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977)).

150. *Fisher v. Flynn*, 598 F. 2d 663, 666 (1st Cir. 1979).

151. 45 Fed. Reg. 74,677 (to be codified in 29 C.F.R. § 1604.11(a)(3)).

VII imposes upon an employer a duty to provide each employee with a discrimination-free environment in which to work.¹⁵² The theory germinated in the following dicta in Judge Goldberg's plurality opinion¹⁵³ for the United States Court of Appeals for the Fifth Circuit in *Rogers v. EEOC*,¹⁵⁴ where the Spanish-surnamed charging party alleged that she had been discriminated against on

152. *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (dicta) (a pattern of excessive and opprobrious ethnic insults would violate Title VII); *Gray v. Greyhound Lines*, 545 F.2d 169, 176 (D.C. Cir. 1976) (dicta) (black plaintiffs' claims of psychological harm resulting from "an atmosphere of discrimination" caused by allegedly unlawful hiring practices, which also resulted in unfair discipline of and work assignment for blacks, sufficient to give them standing); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 384 (D. Minn. 1980) (employer has duty to take action to provide for employee "a work environment free of racial hostility, intimidation, and harassment" when "more than a few isolated incidents of harassment . . . have occurred"); *United States v. City of Buffalo*, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (black police officers entitled to work environment free of racial abuse), *modified on other grounds*, 633 F.2d 643 (2d Cir. 1980) (per curiam); *Lucido v. Cravath, Swain & Moore*, 425 F. Supp. 123, 126 (S.D.N.Y. 1977) (dicta) (Italian plaintiff alleged national origin discrimination with regard to law firm's work assignments, training, rotation, and outside work opportunities; court said Title VII applies to "entire scope of the working environment"); see *MACKINNON*, *supra* note 1, at 40, 78; Kay & Brodsky, *Protecting Women from Sexual Harassment in the Workplace*, 58 TEX. L. REV. 671, 691 (1980); Note, *Job-Related Sexual Harassment & Union Women: What Are Their Rights?*, 10 GOLDEN GATE U. L.J. 929, 964-65 n.74 (1980); *Sexual Harassment & Title VII*, *supra* note 115, at 1021-22; Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 155 (1979); Note, *Work Environment Injury Under Title VII*, 82 YALE L.J. 1695 (1973). The United States Court of Appeals for the Third Circuit refused to comment on the environmental theory argument in one Title VII sexual harassment case, *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 n.1 (3d Cir. 1977), and decided the case on a narrower ground.

The EEOC has consistently followed the discriminatory environment theory. See, e.g., *Gray v. Greyhound Lines*, 545 F.2d 169, 176 (D.C. Cir. 1976); EEOC Decision No. 76-41, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6332 (1975) ("Title VII requires an employer to maintain an atmosphere free of racial or ethnic intimidation"); EEOC Decision No. 74-05, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6387, 6 Fair Empl. Prac. Cas. 834 (1973) (employer responsible for constructive discharge of Spanish-surnamed employee who quit because of atmosphere created by "kidding" of black co-workers); Note, *Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 HARV. WOMEN'S L.J. 173, 178 & n.30 (1980) (citing Brief Amicus Curiae of the EEOC, *Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981), discussed in notes 159-70 and accompanying text *infra*).

The environmental theory is to be distinguished from the position taken in some cases that evidence of other employees' chauvinistic conduct is admissible on the issue of the employer's intent in taking adverse action against a harassed employee. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-05 (1973) (evidence of the employer's treatment of plaintiff and its general practice with respect to minority employment may be relevant to any showing of pretext). The EEOC and one federal district court have held that ongoing practices of addressing white female employees as "Ms." or "Mrs." and black female employees by their first names themselves violate Title VII. *Johnson v. Lillie Rubin Affiliates, Inc.*, 5 Empl. Prac. Dec. ¶ 8542, at 7558, 5 Fair Empl. Prac. Cas. 547, 548-49 (M.D. Tenn. 1973); EEOC Decision 71-32, 2 Fair Empl. Prac. Cas. 866 (1970).

153. Judge Godbold specially concurred and Judge Roney dissented. *Rogers v. EEOC*, 454 F.2d 234, 241, 243 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).
154. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

the basis of national origin because, although she worked with all her employer's patients, the patients were segregated by national origin.¹⁵⁵

[I]t is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers¹⁵⁶

Judge Goldberg pointed out, however, that one ethnic epithet or insult would not create a discriminatory atmosphere violative of Title VII.¹⁵⁷ Those who subsequently embraced the theory have stated that the plaintiff's burden of proof in a "discriminatory environment" case would be difficult to meet.¹⁵⁸

The theory was recently adopted by the United States Court of Appeals for the District of Columbia in *Bundy v. Jackson*,¹⁵⁹ where a female employee alleged that she had been denied a promotion because she rejected the sexual advances of her various supervisors. The district court found that she was not denied the promotion for that reason, but rather because of her lack of qualifications,¹⁶⁰ and went on to hold that the fact that the male supervisors considered making sexual propositions to their female

155. *Id.* at 236-37. The issue before the court was whether the individual's charge filed with the EEOC entitled the EEOC to investigate the employer's patient records. *Id.* at 239. The court held the investigation proper because the EEOC might possibly discover something relevant to employment discrimination against the charging party. Judge Goldberg specifically stated that he was not deciding whether discrimination existed: "[A]ssuming that patient segregation can be found to exist, I leave to another day a judicial evaluation of its effect on the employment conditions of the company's employees." *Id.* at 241.

156. *Id.* at 238.

157. *Id.*; see *Barnes v. Costle*, 561 F.2d 983, 999 n.5 (D.C. Cir. 1977) (proper to require employer to be responsible for and order to stop "persistent racial epithets" by a supervisor because "name-calling of any kind is close to abuse") (emphasis added).

158. See generally 1 A. LARSON, EMPLOYMENT DISCRIMINATION § 41.66 (rev. ed. 1980).

159. 24 Empl. Prac. Dec. ¶ 31,439 (D.C. Cir. Jan. 12, 1981), on remand, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981).

160. 19 Empl. Prac. Dec. ¶ 9154, at 7007 (D.D.C. 1979), rev'd & remanded, 24 Empl. Prac. Dec. ¶ 31,439 (D.C. Cir. Jan. 12, 1981), on remand, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981).

employees "standard operating procedure" was insufficient to violate Title VII.¹⁶¹ The court of appeals reversed, finding that the record contained evidence that the supervisors had, for example, made negative job evaluations of the plaintiff only after she had rejected their advances, that they "at least created the impression that they were impeding her promotion because she had offended them, and they certainly did nothing to help her pursue her harassment claims through established channels."¹⁶² Relying on *Rogers*, Chief Judge J. Skelly Wright, in his opinion for the court, wrote that, unless "sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy," is illegal, "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance, thereby creating the impression that the employer did not take the ritual of harassment and resistance 'seriously.'"¹⁶³ The court of appeals in *Bundy* found that the plaintiff's work environment was so oppressive that it was actionable *per se*.¹⁶⁴

It is important to note that *Bundy* does not support the proposition that any sexual harassment, no matter how slight, violates Title VII because it poisons the environment. The plaintiff in *Bundy* had proved persistent, ongoing propositioning of

161. *Id.* at 7006-07. The court found that the plaintiff had been annoyed but not insulted by the advances, which her supervisors considered a "game" that none of them took seriously, and that because her rejection of them resulted in no adverse employment ramifications there had been no violation of Title VII. *Id.* When the plaintiff appealed, both the EEOC and the Women's Legal Defense Fund filed amicus curiae briefs urging reversal of the district court's decision. *Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439, at 18,529 (D.C. Cir. Jan. 12, 1981).

162. 24 Empl. Prac. Dec. ¶ 31,439, at 18,530 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981).

163. *Id.* at 18,534.

164. Finding the harassment actionable, the *Bundy* court went on to say that, with regard to the plaintiff's claim that she had been improperly denied an employment opportunity, once she had shown such an oppressive environment, she was entitled to a more relaxed burden of proof than she would otherwise have been required to meet. *Id.* at 18,537-39. The court adjusted the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973), formula for establishing a *prima facie* case of disparate treatment discrimination so that the plaintiff need not show

as part of her *prima facie* case that other employees who were no better qualified, but who were not similarly disadvantaged, were promoted at the time she was denied a promotion. . . . We simply require the plaintiff to show that according to the employer's formal rules she was eligible for promotion and that, within the context of the employer's actual practical pattern of promotion, she had a reasonable expectation of the promotion she sought. . . . [T]he employer would then have to show by clear and convincing evidence that, . . . it set qualification criteria for promotion more stringent than the employee could meet.

24 Empl. Prac. Dec. ¶ 31,439, at 18,539 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981).

her. When she complained to the harassers' boss, he was not only unsympathetic, but he also propositioned her.¹⁶⁵ The plaintiff testified that she suffered serious emotional harm from the harassment.¹⁶⁶ She also introduced evidence that other women were similarly harassed by her supervisors.¹⁶⁷ The court stated that "the sexual harassment of the sort *Bundy* suffered"¹⁶⁸ amounted by itself to sex discrimination with respect to the terms, conditions, or privileges of employment because such a holding "follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a *substantially* discriminatory work environment."¹⁶⁹ The facts in *Bundy*, where a reasonable person in the plaintiff's position would rightfully have been seriously upset, reveal a "working environment heavily charged with . . . discrimination"¹⁷⁰ of the type to which Judge Goldberg alluded in *Rogers*.

Both the interim and the final EEOC guidelines endorse the discriminatory environment theory of *Rogers* applied by the court of appeals in *Bundy*. Under the interim guideline, a sexually harassed employee would have had a cognizable claim even though the harassment did not trigger an employment decision concerning him or her, if it had "the purpose or effect of substantially interfering with that individual's work performance or creating an intimidating, hostile, or offensive working environment."¹⁷¹ Before it had the benefit of the court of appeals' decision in *Bundy*, the United States District Court for the District of Columbia considered this interim guideline in another sexual harassment case, *Clark v. World Airways, Inc.*¹⁷² Although the plaintiff in *Clark* argued that she had been constructively discharged when she quit her job after an executive made a pass at her on an out-of-town training trip, the court found that she had left her employment for other reasons. It also held that the harassment she proved was insufficient to amount to a discriminatory environment under the EEOC's interim guidelines, because after the plaintiff completed the "brief orientation period" she was to have "little day-to-day contact" with the man in question.¹⁷³ Be-

165. The boss told Bundy that he would like to "get her into bed" himself and that "any man in his right mind would want to rape" her. 19 Empl. Prac. Dec. ¶ 9154, at 7006 (D.D.C. 1979), *rev'd and remanded*, 24 Empl. Prac. Dec. ¶ 31,439 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981).

166. 24 Empl. Prac. Dec. ¶ 31,439, at 18,531 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981).

167. *Id.* at 18,540 n.3.

168. *Id.* at 18,532 (emphasis added).

169. *Id.* (emphasis omitted and emphasis added).

170. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

171. 29 C.F.R. § 1604.11(a)(3) (1980).

172. 24 Empl. Prac. Dec. ¶ 31,385 (D.D.C. 1980).

173. *Id.* at 18,292-93 n.11.

cause the harassment in *Clark* was confined to one incident that implied no threat of retaliation, *Clark* is easily distinguishable from *Bundy*.

The final EEOC guideline on this point is identical to the interim one examined in *Clark*, except that the word "substantially" is replaced by "unreasonable."¹⁷⁴ Under the final guidelines, then, an employee has a cause of action if sexual harassment "has the purpose or effect of *unreasonably* interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."¹⁷⁵

2. De Minimus Harm

By requiring that "environmental discrimination" be unreasonable before it is actionable, the EEOC recognizes that there can be discrimination too slight to be the basis of a cognizable Title VII claim. Although no post-guideline court cases other than *Bundy* and *Clark* have directly raised this issue, courts in pre-guideline cases have held that Congress did not intend to outlaw all gender-based disparate treatment affecting employment, but only treatment which significantly affects an individual's employment opportunities or conditions of employment.¹⁷⁶ Courts have

174. The supplementary information accompanying the final guidelines provided this cryptic explanation of the change: "Many commentators raised questions as to the meaning of the word 'substantially.' The word 'unreasonably' more accurately states the intent of the Commission and was therefore substituted to clarify that intent." 45 Fed. Reg. 74,676 (1980).

175. *Id.* at 74,677 (to be codified in 29 C.F.R. § 1604.11(a)(3)) (emphasis added). The United States District Court for the District of North Dakota has held that a supervisor's touching the plaintiff's breasts and buttocks and, when inebriated, making a pass at her did not amount to a discriminatory environment actionable under the guidelines. *Walter v. KFGO Radio*, 26 Fair Empl. Prac. Cas. 982, 986-87 (D.N.D. Aug. 4, 1981). The plaintiff had never complained about the conduct and she had received proper salary raises and a promotion. *Id.*

176. *Barnes v. Costle*, 561 F.2d 983, 990-91 n.57 (D.C. Cir. 1977) (distinguishing sexual harassment cases from "long hair" cases because the latter involve something "minor" that does not "pose distinct employment disadvantages for one sex"); *Smith v. Amoco Chem. Corp.*, 20 Empl. Prac. Dec. ¶ 30,165, at 11,847, 20 Fair Empl. Prac. Cas. 724, 724 (S.D. Tex. 1979) (foreman's verbal passes at female plaintiff "did not rise to such a level as to constitute a Title VII violation" in the absence of his retaliation against her for her rejection of them); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1389-90 (D. Colo. 1978) (to be actionable under Title VII, sexual harassment must "substantially" affect one's employment, which condition was met when plaintiff was fired); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 463 (E.D. Mich. 1977) (asking whether, if it recognizes a cause of action for sexual harassment, "flirtations of the smallest order" will give rise to Title VII liability) (citing *Miller v. Bank of America*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd & remanded*, 600 F.2d 211 (9th Cir. 1979)); *Williams v. Saxbe*, 413 F. Supp. 654, 660 (D.D.C. 1976) ("assuming [as suggested by case holding that short hair requirement for male employees does not violate the Act] Title VII permits a weighing of the effect of a particular policy . . . , Court could not find the instant policy or practice to have an insignificant effect"), *rev'd & remanded on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *decision on remand sub nom. Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980); see *Siniscalco, Sexual Harassment & Employer Liability: The Flirtation that Could Cost a Fortune*, 6 EMPLOYEE REL. L.J. 277, 285 (1980); 17 S. TEX. L.J. 409, 412 (1976).

concluded in non-harassment cases, for example, that an employer's allowing women to wear their hair longer than could men¹⁷⁷ or allowing men to wear slacks but requiring women to wear skirts¹⁷⁸ is so de minimus as to be non-actionable. The consensus of the courts today is that an employer may impose different grooming and dress standards on males and females as long as the standards are reasonable.¹⁷⁹

The EEOC's sexual harassment guidelines evidence awareness of the possible de minimus problem by providing that

[i]n determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.¹⁸⁰

This caveat was made necessary by the vagueness of the section of the guidelines defining sexual harassment. For example, the language concerning "verbal conduct of a sexual nature"¹⁸¹ that is a "term or condition"¹⁸² of one's employment arguably sanctions charges of sex discrimination when co-workers tell risque jokes in order to make someone blush or when one person, in insulting

177. *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc) (newspaper's refusal to hire a male with shoulder-length hair while it would hire a female with long hair permissible). *But see* *Hubbard v. Ben Dyer Assoc.*, 6 Empl. Prac. Dec. ¶ 8730, 6 Fair Empl. Prac. Cas. 36 (D. Md. 1973) (court should consider whether job in question requires contact with customers). On the other hand, the EEOC has taken the position that disparate treatment of men and women with long hair *per se* violates Title VII. 1 A. LARSON, EMPLOYMENT DISCRIMINATION § 41.11, at 8-83 & n.15 (rev. ed. 1980); *id.* § 41.11, at 8-84 n.17 (Supp. 1980).

178. *Janigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979). *But see* *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979) (bank violated Title VII by permitting male employees to wear business suits, but requiring women to wear uniforms), *cert. denied*, 445 U.S. 929 (1980).

179. *E.g.*, *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-56 (9th Cir. 1977) (requirement that only male employees wear neckties did not violate Title VII). *See generally* 1 A. LARSON, EMPLOYMENT DISCRIMINATION §§ 10.00-17.00 (rev. ed. 1980); Annot., 27 A.L.R. Fed. 274 (1976). This reflection of community standards is permitted even though generally customer preference cannot validate sex discrimination. *Fernandez v. Wynn Oil Co.*, 26 Empl. Prac. Dec. ¶ 32,060 (9th Cir. Aug. 17, 1981) (if woman had been denied job of director of international marketing because of her sex, such denial would not be excused by fact that some customers in South America would not do business with a woman); *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir.) (female sex not a BFOQ for stewardesses' job description), *cert. denied*, 404 U.S. 950 (1971); 29 C.F.R. § 1604.2(a) (1980) (EEOC guidelines on sex discrimination).

180. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(b)). In a recent decision, the EEOC stated that this language reflects its position that a purely personal relationship cannot in itself violate Title VII. EEOC Decision No. 81-18, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6758, at 4808 (Apr. 3, 1981).

181. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).

182. *Id.* (to be codified in 29 C.F.R. § 1604.11(a)(1)).

another, uses a sexual term, or an employer comments to his or her employee on the attractive physique of a stranger passing by on the street outside the office. If that were so, the guideline would make it possible for an unreasonable employee to harass an employer, rather than vice-versa, by charging it with commission of a de minimus wrong.

Yet even the most liberal judicial readings of Title VII, such as that by the court of appeals in *Bundy*, have found a Title VII violation because of a discriminatory environment only when the employer had participated in clearly non-trivial harassment which had the effect of substantially and unreasonably interfering with the plaintiff's work.¹⁸³ In the *Bundy* appeal, which was decided after the final guidelines took effect, Chief Judge Wright noted that the guidelines defined sexual harassment broadly. He nonetheless recognized that casual or isolated manifestations of a discriminatory environment, such as a few ethnic or racial slurs, may be too inconsequential to give rise to a Title VII cause of action.¹⁸⁴

The United States District Court for the Western District of Oklahoma, in *Brown v. City of Guthrie*,¹⁸⁵ construed the guidelines in a similarly reasonable manner when it found that the intolerable conditions the plaintiff had been subjected to, which contributed to her resignation, constituted a discriminatory environment violative of Title VII. The *Brown* facts illustrate what the EEOC might have had in mind when it proscribed not only "[u]nwelcome sexual advances [and] requests for sexual favors" but also "other verbal or physical conduct of a sexual nature."¹⁸⁶

183. See notes 176-79 and accompanying text *supra*.

184. *Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439, at 18,535, 18,540 n.9 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981). Similarly, the United States Court of Appeals for the Eighth Circuit has held that a supervisor's calling an Italian-American employee a "dago" and casually referring to other Italian-American employees as "the Mafia" do not violate Title VII. *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (*per curiam*). *Accord*, *Friend v. Leidinger*, 446 F. Supp. 361, 383 (E.D. Va. 1977) ("infrequent insults do not a Title VII case make"), *aff'd*, 588 F.2d 61 (4th Cir. 1978). The EEOC, however, found cause to believe that racial discrimination had occurred when a district manager used the term "nigger" in a joke at the close of a training program. See MACKINNON, *supra* note 1, at 211 (citing [1973] EEOC Decisions (CCH) ¶ 6346 (1972)).

185. 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).

186. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)). Employees have in the past complained of crude comments, jokes, and exposure to sexy or sexist pictures. *E.g.*, *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978); *Neeley v. American Fidelity Assurance Co.*, 17 Empl. Prac. Dec. ¶ 8395, 17 Fair Empl. Prac. Cas. 482 (W.D. Okla. 1978). One eighteen-year-old woman's employer repeatedly described to her the intimate details of his marriage and asked her opinion of different sexual positions. MACKINNON, *supra* note 1, at 29. Reported sexual behavior runs the gamut from a man's staring at a woman to exposing himself to her. Lublin, *Resisting Advances: Employers Act to Curb Sex Harassing on Job; Lawsuits, Fines Feared*, Wall St. J., Apr. 23, 1981, at 20, cols. 2 & 3.

The plaintiff's shift commander at a police station had approached her twice at work and asked her to take her clothes off, had shown her "girlie" magazines and asked her to compare herself to the nude women pictured in them, and had repeatedly viewed, in her presence, a videotape of her searching a naked female prisoner, while he commented upon the prisoner's physical attributes.¹⁸⁷ When she complained to the police chief, he told her she was over-reacting.¹⁸⁸ The outrageous facts of *Brown* make it clear that the plaintiff reacted reasonably and was not a particularly thin-skinned or testy employee.

In cases concerning complaints of racial, religious, or national origin harassment by co-workers who made bigoted comments or jokes, several courts have emphasized that Title VII was not enacted to shelter individuals from every unpleasantness encountered in the employment setting.¹⁸⁹ One court explained:

There has been evidence that plaintiff was subjected to treatment by fellow employees that might be offensive to one of sensitive feelings and might be ignored by others. . . .

. . . .

. . . Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law ever could be.¹⁹⁰

187. 22 Fair Empl. Prac. Cas. 1627, 1629 (W.D. Okla. 1980).

188. *Id.* at 1631.

189. See *Higgins v. Gates Rubber Co.*, 578 F.2d 281, 283 (10th Cir. 1978) (employer "cannot be an insurer against all racial insults and racial incidents" so as to guarantee a workplace "completely sterile of . . . prejudice") (quoting opinion of the trial judge); *Friend v. Leidinger*, 446 F. Supp. 361, 382 (E.D. Va. 1977) ("Any organization . . . has its tensions, friction, and 'belly aching,' and some of it will be because of racial differences. But this fact of life does not indict defendants [employers] who have abundantly shown that they have striven to reduce racial tension and correct instances of unfairness related to race. Defendants [employers] cannot be faulted for failing to create a perfect world."), *aff'd*, 588 F.2d 61 (4th Cir. 1978); *Walker v. Columbia Univ.*, 407 F. Supp. 1370, 1377 (S.D.N.Y. 1976) (employees' "residuary 'male chauvinism' . . . does not make a pattern or practice chargeable to an employer"); *Howard v. National Cash Register Co.*, 388 F. Supp. 603, 605-06 (S.D. Ohio 1975); *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177, 1186 (W.D. Pa. 1973). But see EEOC Decision No. CL 68-12-431EU, 2 Fair Empl. Prac. Cas. 295 (1969) (Polish employee offended by co-workers' Polish jokes had cause of action even though others of same national origin were not offended).

190. *Howard v. National Cash Register Co.*, 388 F. Supp. 603, 605-06 (S.D. Ohio 1975) (quoting without comment Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936)). When, on the other hand, the plaintiff is a sensitive individual but the discrimination complained of would be objectionable to

That approach is consistent with even the most liberal Title VII cases, *Rogers* and *Bundy*, and with the policy behind the common law rules that one cannot recover for a mere insult¹⁹¹ and that the tort theory of intentional infliction of emotional distress does not provide redress for trivialities.¹⁹² Undoubtedly, part of the courts' motivation is the thought that the need to judicially right such minor wrongs is outweighed by the concomitant expense to the public. In addition, these holdings further one of the policies behind the first amendment's guarantee of freedom of speech, which is the provision of a safety valve through which aggression can be vented verbally rather than through physical violence.¹⁹³ Similarly, if a sexual insult is uttered in the heat of anger during a personal conflict, it should not give rise to a Title VII suit.

The third clause of the guideline provides that conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"¹⁹⁴ constitutes action-

a reasonable person, the plaintiff has a cause of action. *E.g.*, *Rice v. Litton Sys., Inc.*, 7 Empl. Prac. Dec. ¶ 9354, 8 Fair Empl. Prac. Cas. 76 (D.D.C. 1974) (employer liable for employees' discrimination against black plaintiff with regard to vacation and workload, despite the fact that "plaintiff [was] an extremely sensitive individual quick to attribute callousness to race prejudice"), *aff'd mem.*, 530 F.2d 1094 (D.C. Cir. 1976); *cf.* *Kyriazi v. Western Elec. Co.*, 486 F. Supp. 894, 936, 942 (D.N.J. 1978) (the fact that a "weaker, more pleasant, less demanding person . . . might well have capitulated" does not excuse the harassment; supervisors wrongly regarded plaintiff, the target of sexual remarks and cartoons by her co-workers, "as an over-sensitive woman who should be expected to meet and endure all this in 'a man's working world'").

191. *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 744, 565 P.2d 1173, 1178 (1977) (en banc) (Stafford, J., concurring in result); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 12, at 54-55 (4th ed. 1971).

192. *Harris v. Jones*, 281 Md. 560, 567, 380 A.2d 611, 615 (1977). In *Harris*, the Court of Appeals of Maryland stated:

"[N]ot . . . every emotional upset should constitute the basis of an action. Indiscriminate allowance of actions for mental anguish would encourage neurotic overreactions to trivial hurts, and the law should aim to toughen the psyche of the victim rather than pamper it. But a line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility."

Id. at 571, 380 A.2d at 617 (quoting *Knierim v. Izzo*, 211 Ill. 2d 75, 85, 174 N.E.2d 157, 164 (1961)). The court also cited with approval a California case that held that a black employee, who had been called "nigger," whose union status had been ignored, and who had been fired without cause, had a cause of action for intentional infliction of emotional distress. *Id.* at 569-70, 380 A.2d at 615-16 (citing *Alcorn v. Anbro Eng'r, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 96 Cal. Rptr. 88 (1970)).

193. *Nimmer, The Right to Speak from Time to Time: First Amendment Theory Applied to Libel & Misapplied to Privacy*, 56 CAL. L. REV. 935, 949 (1968).

194. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).

able sexual harassment. The EEOC's use of the modifier "unreasonably" indicates its cognizance of the fact that a particular sexual comment or action could be so de minimus as to not by itself constitute a term or condition of employment under Title VII. In view of this, the word "unreasonably" should be read to modify "intimidating, hostile, or offensive" as well as "interfering."¹⁹⁵

In an apparent inconsistency with the EEOC's recognition that de minimus wrongs are not actionable, the guideline seems to require only that the conduct have either the purpose or the effect of creating the undesirable results. If these are intended to be alternative bases for causes of action, the statute would be violated if a sexual remark or action has the effect of unreasonably interfering with the target's work performance or intimidating or offending him or her, regardless of the actor's intent. That makes sense and is consistent with the developing case law.¹⁹⁶ Further, Title VII would be violated if the speaker or actor has the purpose of or intends to interfere with, intimidate, or offend the other unreasonably but fails to do so. Perhaps the EEOC intended to discourage sexual harassment as much as possible by telling the employer, "Don't even try it!" But the guideline should not be applied to give a person standing to bring a Title VII complaint if the employer intended to offend or upset the employee but failed to do so. There would be no basis for finding a violation of Title VII in the absence of harm to anyone. The EEOC implicitly recognized that there must be harm in order for there to be a cause of action when it provided that only unwelcome sexual conduct is ac-

195. Otherwise, the guideline would hold the employer responsible if sexual conduct "has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment" for a particularly sensitive or testy employee. The guideline should be read to avoid that result. *Cf., e.g.,* *Richards v. United States*, 369 U.S. 1, 11 (1962) ("in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object'"); *Condon v. Finch*, 305 F. Supp. 63, 64 (D.N.H. 1969) ("legislative grammar often falls short of accurately expressing the legislative intent").

196. See notes 162-70, 185-89 and accompanying text *supra*.

tionable.¹⁹⁷ Explicit recognition of this point is found in the Commission's statement in the supplementary information accompanying the interim guidelines: "Interim § 1604.11(b) recognizes that the question of whether a particular action or incident establishes a purely personal social relationship without a discriminatory employment *effect* requires a factual determination."¹⁹⁸

The EEOC must be especially careful to make clear that neither trivial charges nor claims regarding acts from which no harm resulted will be found to be actionable Title VII violations. This clarification is particularly important in the area of harass-

197. 45 Fed. Reg. 74,676 (1980) (to be codified in 29 C.F.R. § 1604.11(a)). The guidelines' proscription of "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" is worded so that it is arguable that "unwelcome" does not modify "requests for sexual favors, and other verbal or physical conduct of a sexual nature." The guidelines must, of course, be read as if "unwelcome" is repeated before "requests" and before "verbal," so as to avoid the absurd result that sexual remarks or caresses are actionable by the recipient, even when he or she welcomes them. *See, e.g., United States v. Bishop*, 412 U.S. 346, 356 (1973) ("context is important in the quest for the word's meaning"); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (courts may deviate from a literal interpretation of a statute if it would lead to absurd results).

Although the guidelines say nothing about how the determination is made as to whether particular sexual conduct was unwelcome, the only court that has considered the question suggested that "one isolated incident or a mere flirtation" might not suffice because the instigator might not realize that his or her advance would be unwelcome. *Brown v. City of Guthrie*, 22 Fair Empl. Prac. Cas. 1627, 1632 (W.D. Okla. 1980); *cf.* 51 N.Y.U. L. REV. 148, 164 n.76 (1976) (only an "extreme or coercive" isolated advance should be held to violate Title VII). The *Brown* court would inquire beyond the complainant's assertion that the advance was unwelcome and would consider relevant the fact that the person making the advance reasonably believed that it would be welcome. Under this interpretation of the guideline, the EEOC and the courts could consider such facts as whether the plaintiff accompanied the alleged harasser to his or her apartment for a nightcap and "snuggled up" to the alleged harasser before the advance was made. Subsection (b) of the EEOC guidelines, promising consideration of the circumstances of the advance, would then come into play. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(b)). For example, in one charge filed with the EEOC, the complainant explained that, because she felt sorry for her supervisor, she had let him visit her at her home but refused to submit to his sexual advances. *Sexual Harassment & Title VII*, *supra* note 115, at 1016 n.78. The supervisor in this case might have reasonably thought the plaintiff would be receptive. *Cf. Caldwell v. Hodgeman*, 4 EMPL. PRAC. GUIDE (CCH) (26 Empl. Prac. Dec.) ¶ 31,932 (Mass. Dist. Ct. Apr. 6, 1981) (after quitting, claimant returned to place of employment and visited harasser). In considering such facts, the EEOC would look at the "totality of the circumstances." 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(b)).

In other areas of the law, too, consideration is given to the reasonableness of the actor's belief that the act is welcome. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 10, at 37 (4th ed. 1971) (battery). *But see* MACKINNON, *supra* note 1, at 46, 48, 54-55, 286-87 n.87 (suggesting that a reasonable woman's response, such as of intimidated silence, might be different from what a reasonable man expects). Such considerations of reasonable expectations may have led the court in *Walter v. KFGO Radio*, 26 Fair Empl. Prac. Cas. 982 (D.N.D. Aug. 4, 1981), to find no actionable harassment when the plaintiff did not complain to the harasser or any one else about his sexual advances. *See* note 175 *supra*.

198. 45 Fed. Reg. 24,024 (1980) (emphasis added).

ment, when the subject matter of the charge easily lends itself to fabrication concerning what occurred behind closed doors.¹⁹⁹ Employers wary of such claims may find some solace in subsection (b) of the guidelines, which promises that the EEOC will consider all facts, "such as the nature of the sexual advances and the context in which the alleged incidents occurred."²⁰⁰ The EEOC should soon judicially gloss the guideline to make it clear that merely intended but ineffective harassment or trivial unpleasantness does not give rise to a Title VII cause of action.

Recently, the EEOC has taken a step in that direction. The only Commission decision to date that construes subsection (a)(3) of the guidelines presented outrageous facts that did not raise the issue of de minimus wrongs. The director of a correctional youth camp was found to have engaged in a pattern of soliciting sexual favors from and making unwanted vulgar remarks to many of his female employees, including the four charging parties.²⁰¹ When the women refused him, he took retaliatory action against them, such as giving them poorer evaluations than they had previously received.²⁰² The EEOC found reasonable cause to believe there had been violations not only of subsections (a)(1) and (a)(2),²⁰³ but also of subsection (a)(3) because "the Director habitually made un-

199. *But see* MACKINNON, *supra* note 1, at 96-97 (arguing that women are loath to complain even where the injury is real).

It has been asserted that frivolous Title VII sexual harassment suits will be deterred because courts may, upon finding a suit frivolous, order a plaintiff to pay the defendant's attorneys' fees. *Sexual Harassment & Title VII*, *supra* note 115, at 1034. The author knows of no complainants who have been ordered to pay an employer's costs incurred in defending itself before the EEOC, although such an order would be appropriate. The EEOC has occasionally been ordered to pay the employer's attorneys' fees. *E.g.*, *EEOC v. American Nat'l Bank*, 21 Fair Empl. Prac. Cas. 1532, 1592-95 (E.D. Va. 1979). Employers have been ordered to pay a prevailing charging party's attorneys' fees for work performed at the federal and state agency stage. *See Carey v. New York Gaslight Club*, 598 F.2d 1253 (2d Cir. 1979) (plaintiff, whose success in state administrative proceedings led to dismissal of federal court Title VII claim, was entitled to attorneys' fees under Title VII), *aff'd*, 447 U.S. 54 (1980); *Fischer v. Adams*, 572 F.2d 406, 410 (1st Cir. 1978) ("a party who has prevailed on the merits of a discrimination complaint in administrative proceedings . . . may be granted fees by a federal district court under section 706(k)"); *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977) (Congress intended to award fees for work done at administrative as well as judicial proceedings); *Johnson v. United States*, 12 Empl. Prac. Dec. ¶ 11,039 (D. Md. 1976), *aff'd*, 554 F.2d 632 (4th Cir. 1977). But, because the evidence will often amount to a "swearing contest" of one person's word against the other, a finding of frivolity is unlikely. Similarly, if a plaintiff mistakenly believes that he or she was harassed because of his or her sex, the suit would not have been frivolously filed. *Cf. McCampbell v. Chrysler Corp.*, 425 F. Supp. 1326, 1329 (E.D. Mich. 1977) (no bad faith shown in plaintiff's charge that blacks were disciplined more strictly than whites, when plaintiff believed this to be true and there was conflicting evidence).

200. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(b)).

201. EEOC Decision No. 81-18, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6758, at 4808-09 (Apr. 3, 1981).

202. *Id.* at 4809-12.

203. *Id.* at 4809-10.

wanted statements of a sexually explicit nature directly to, in reference to, or degrading to Charging Parties A, B, C, and D and other female employees which created an intimidating and offensive working environment."²⁰⁴ But the Commission was careful to point out that "the use of generally vulgar language of a sexual nature, not directly to or about women, in an employment situation will not always constitute sexual harassment."²⁰⁵ It stated that, absent the other conduct found to be sexually harassing, the director's sexual remarks made in the presence of, but "not made directly to, in reference to, or degrading to" the charging parties would not constitute sexual harassment.²⁰⁶

D. Harassment by the Employer

The final requirement which must be satisfied in order for discrimination to be actionable under section 703 is that the alleged illegal conduct be committed by an employer²⁰⁷ covered by the Act.²⁰⁸ Title VII defines employer as including "any agent" of such an employer.²⁰⁹ The question thus arises as to when an act will be considered that of an employer or its agent. Clearly the employer cannot be held liable for the behavior of everyone an

204. *Id.* at 4809. The director made such statements as "I am hot after your body" and "You're lucky I have my hands full, because if I didn't, I'd grab your [breasts] and put them in my mouth." *Id.* at 4802, 4804.

205. *Id.* at 4809.

206. *Id.* In that case, however, the director's remarks contributed to an offensive work environment that had been "created by the Director's other lewd activities." *Id.*

207. Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (1976).

208. See notes 25 & 26 and accompanying text *supra*.

209. Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (1976). Some courts have held that the agent is individually answerable as an employer under Title VII. *Stringer v. Commonwealth*, 446 F. Supp. 704 (M.D. Pa. 1978); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 158, 160 (S.D. Ohio 1976) (harasser vested with managerial responsibilities was individually liable as agent); *Doski v. M. Goldseker Co.*, 9 Empl. Prac. Dec. ¶ 10,135 (D. Md. 1975), *rev'd on other grounds*, 539 F.2d 1326 (4th Cir. 1976); *Padilla v. Stringer*, 395 F. Supp. 495, 497 (D.N.M. 1974); see *Sexual Harassment & Title VII*, *supra* note 115, at 1030-31. *But cf. Guyette v. Stauffer Chem. Co.*, 4 EMPL. PRAC. GUIDE (CCH) (27 Empl. Prac. Dec.) ¶ 32,138 (D.N.J. June 17, 1981) (mere non-supervisory co-worker would not be agent so as to be liable under Title VII for sexual harassment). Because of problems of governmental immunity, plaintiffs are likely to name individual supervisors as defendants if the employer is a governmental entity. *E.g., Wong v. Jones*, 24 Empl. Prac. Dec. ¶ 31,428 (N.D. Fla. 1980); *Shanks v. Harrington*, 21 Fair Empl. Prac. Cas. 590, 591 (N.D. Iowa 1979). The statutory language is more plausibly construed to mean only that a person otherwise an employer under Title VII is responsible not only for his or her acts, but also for those of his or her agent. If the malefactor acted as the employer's agent, then the employer is liable and there is no need to hold the agent individually liable as well. Moreover, with the exception of injunctive relief, the equitable remedies envisioned by the Act, such as hiring, back pay, and reinstatement, are enforceable only against the employer. See Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1976).

employee encounters. Sexual harassment of an employed person is not necessarily confined to the employment setting.²¹⁰ For example, an employee may be the target of crude comments by construction workers, prostitutes, or even school children met en route to work. The initial line of employer responsibility should be drawn at the door of the place where the employer requires the employee to work. Yet, even there Title VII does not hold the employer liable for all acts of everyone with whom an employee comes in contact: the individual employer, supervisors, co-workers, customers, clients, other business invitees, and trespassers.

The guidelines contain four provisions regarding liability and responsibility of employers. In the first, an employer is held strictly liable for sexual harassment by its agents and supervisory employees.²¹¹ The EEOC thus adopted the most liberal judicial position on this issue. With regard to the employer's liability for harassment of employees by their co-workers, the second provision follows the mainstream of case law: the employer is liable if it has actual or constructive notice of the problem and fails to take appropriate corrective measures.²¹² The EEOC appears to break new ground in the third provision by applying that same standard to harassment of employees by non-employees, although the Commission promises to take all circumstances into account in determining whether the employer is liable.²¹³ In the final provision, the EEOC urges employers to take preventive measures against sexual harassment.²¹⁴ The employer who takes such measures, however, is not rewarded by a release from its strict liability for the acts of its supervisory employees and its agents.²¹⁵

210. See, e.g., *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980) (complaint of female students that sexual harassment by professors violated Title IX of the Civil Rights Act of 1964, 20 U.S.C. § 1681 (1976) dismissed); Wehrwein, *Sex Charges Filed Against Newly Resigned Iowa Judge*, Nat'l L.J., Mar. 9, 1981, at 4, col. 1 (ex-judge indicted for forcibly soliciting sexual favors from a woman scheduled to appear before him on bad check charges); TIME, Feb. 4, 1980, at 84 (complaints by female college students of sexual harassment by male professors); cf. McCord, *Two at UMBC Tied to Slurs to Keep Jobs*, The Sunday Sun (Baltimore), Apr. 5, 1981, at B1, col. 1 (university athletic department employees accused of making racial slurs to students).

211. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(c)).

212. *Id.* (to be codified in 29 C.F.R. § 1604.11(d)).

213. *Id.* (to be codified in 29 C.F.R. § 1604.11(e)).

214. *Id.* (to be codified in 29 C.F.R. § 1604.11(f)).

215. See *id.* (to be codified in 29 C.F.R. § 1604.11(c)). The EEOC has subsequently referred to the guidelines as providing for "strict liability for the acts of agents and supervisory employees." EEOC Decision No. 81-18, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6758, at 4808, 4810 (Apr. 3, 1981).

1. Employer's Liability for Acts of Its Agents and Supervisory Personnel

In order for a person's act to fall within the scope of Title VII, the actor must be either the employer or its agent.²¹⁶ Certainly an individual employer is liable for his or her own acts and for the acts of others he or she ratifies. The greater difficulty is in determining when another acts as the employer's agent. The EEOC guideline provides as follows:

Applying general Title VII principles, an employer, . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.²¹⁷

It seems that the EEOC considers supervisory personnel to be agents of the employer; yet there would be no need to specify both agents and supervisory employees if the two terms were simply interchangeable. The conclusion that they are not synonymous is further supported by the guidelines' provision that the EEOC "will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity."²¹⁸

In response to requests for clarification of the term "agent" as identically used in the interim guidelines, the EEOC stated, "'Agent' is used in the same way here as it is used in § 701(b) of Title VII where 'agent' is included in the definition of 'employer.'" ²¹⁹ Section 701(b), however, provides only that an employer is responsible for the acts of its agents; Title VII does not define the term.²²⁰ Because the guidelines set forth other specific rules concerning non-agent "fellow employees"²²¹ and "non-employees,"²²² the EEOC may have included agents in the provision concerning supervisors as a catch-all for non-supervisory personnel who are clearly part of the management. For exam-

216. Civil Rights Act of 1964 §§ 701(b), 703(a)(1)-(2), 42 U.S.C. §§ 2000e(b), 2000e-2(a)(1)-(2) (1976).

217. 45 Fed. Reg. 74,677 (to be codified in 29 C.F.R. § 1604.11(c)). The guideline is silent as to any question of individual liability of the supervisor or agent involved. See note 209 *supra*.

218. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(c)).

219. *Id.* at 74,676.

220. See Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (1976).

221. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(d)).

222. *Id.* (to be codified in 29 C.F.R. § 1604.11(e)).

ple, a corporate employer should generally be answerable for the acts of its top officers and members of the board,²²³ regardless of whether they are technically supervisory personnel.

Despite having received many comments criticizing an identical provision in the interim guidelines mandating strict liability for conduct of agents and supervisory employees as "too broad and unsupported by case law,"²²⁴ the EEOC stood by that approach. In rejecting this criticism, the EEOC stated that "the Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates Title VII, regardless of knowledge or any other mitigating factors."²²⁵ The statement is accurate as to the EEOC's position with regard to supervisors' acts²²⁶ and as to the courts' position in non-harassment cases. Court decisions in sexual harassment cases, however, have not mirrored the EEOC's viewpoint.

While courts have held in non-harassment Title VII cases that employers are generally liable for their supervisors' acts,²²⁷ they have been divided on that issue in sexual harassment cases. A few early decisions viewed sexual harassment as the result of a "personal proclivity" of the harasser²²⁸ and concluded that, absent ex-

223. See, e.g., *Clark v. World Airways, Inc.*, 24 Empl. Prac. Dec. ¶ 31,385 (D.D.C. 1980) (corporation automatically vicariously liable for tort committed by individual who owned more than 80% of its stock, was a director, and held the three top executive positions). Judge Butzner, concurring in part and dissenting in part in *Friend v. Leidinger*, 588 F.2d 61, 69 (4th Cir. 1978), opined that an employer should be liable for racial harassment by its middle-level employees. But see *Ginsburg & Koreski, Sexual Advances by an Employee's Supervisor: A Sex-Discrimination Violation of Title VII?*, 3 EMPLOYEE REL. L.J. 83, 92 (1977) (whether a supervisor stands high enough on corporate ladder to be considered the "employer" should be decided on a case-by-case basis). See also *Neeley v. American Fidelity Assurance Co.*, 17 Empl. Prac. Dec. ¶ 8395, 17 Fair Empl. Prac. Cas. 482 (W.D. Okla. 1978) (corporate employer not liable when it had a strictly enforced unwritten policy against sexual harassment and did not know of vice-president's acts of telling plaintiff vulgar jokes, putting his hand on her shoulders, and showing her photographs of sexual activity, while he explained her job duties).

224. 45 Fed. Reg. 74,676 (1980).

225. *Id.*

226. The EEOC has held that ethnic and racial slurs made toward employees by supervisors, as well as by employers, violate Title VII. 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 84.10, at 17-1 (rev. ed. 1980) (citing EEOC Decision Nos. 72-0779 (4 Fair Empl. Prac. Cas. 317 (1971)) & 71-909 (3 Fair Empl. Prac. Cas. 269 (1970)); 4 *id.* § 95.10 (citing EEOC Decision YAL-078 (1969) (unreported)).

227. E.g., *Friend v. Leidinger*, 588 F.2d 61, 69 (4th Cir. 1978) (Butzner, J., concurring in part and dissenting in part); *Calcote v. Texas Educ. Foundation*, 578 F.2d 95, 98 (5th Cir. 1978) (dicta); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977).

228. E.g., *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated & remanded mem.*, 562 F.2d 55 (9th Cir. 1977).

plicit employer approval or ratification, an employer was not responsible for sexual harassment by a supervisor.²²⁹ Because that rule would enable an employer to circumvent Title VII by merely announcing that it prohibits all illegal discrimination, but then giving its supervisors a free rein, it has been rejected by the courts in more recent decisions.²³⁰

Several courts have concluded that an employer becomes liable for a supervisor's sexually harassing acts at the point when it has knowledge of the harassment and has failed to take prompt,²³¹ appropriate corrective action.²³² These cases suggest that an employer must investigate allegations of harassment²³³

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229. *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976) ("floodgates" will open if sexual harassment claims are recognized, so that we will need 4,000 federal judges rather than 400), *rev'd & remanded*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of America*, 418 F. Supp. 233, 234-36 (N.D. Cal. 1976) (no employer liability for supervisor's "unauthorized isolated sex-related acts"), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163-65 (D. Ariz. 1975) ("The only sure way an employer could avoid [Title VII] charges would be to have employees who were asexual."), *vacated & remanded mem.*, 562 F.2d 55 (9th Cir. 1977). *But see Sexual Harassment & Title VII*, *supra* note 115, at 1025-27 (criticizing *Corne* and other cases for holding employer not liable unless supervisor acting within scope of employment).
230. *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 562 F.2d 55 (9th Cir. 1977). Although *Ludington v. Sambo's Restaurants, Inc.*, 474 F. Supp. 480 (E.D. Wis. 1979), which adopted the earlier approach, has not been overruled, it has been undermined to the extent that it relied on the district court cases subsequently overruled by circuit courts. *See* note 229 *supra*.
231. *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1049 (3d Cir. 1977).
232. *Id.* at 1048-49 (Title VII violated when employer does not take prompt and appropriate remedial action after actual or constructive knowledge of supervisor's sexual extortion); *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) (stating, though, that employers are generally liable under Title VII for supervisors' acts); *Vinson v. Taylor*, 22 Empl. Prac. Dec. ¶ 30,708, 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980) (employer not liable when unaware of harassment); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1383, 1389-90 (D. Colo. 1978) (employer liable when made aware but failed to take adequate corrective measures); *Friend v. Leidinger*, 446 F. Supp. 361, 382-83 (E.D. Va. 1977) (employer "liable for acts of supervisors only where the employer either overtly or covertly, authorized, acquiesced in, or ratified the supervisors' discriminatory conduct"), *aff'd*, 588 F.2d 61 (4th Cir. 1978); *cf. Croker v. Boeing Co.*, 437 F. Supp. 1138, 1194 (E.D. Pa. 1977) (unavoidable inference that "management" was or should have been aware of several years' racial harassment of black female by several supervisors), *aff'd*, 4 EMPL. PRAC. GUIDE (CCH) (27 Empl. Prac. Dec.) ¶ 32,160 (3d Cir. Sept. 30, 1981).
233. *DeGrace v. Rumsfeld*, 614 F.2d 796, 804-05 (1st Cir. 1980); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1389-90 (D. Colo. 1978) (merely calling in the "accused" and accepting his denial is insufficient).

and, if they are found to have substance, punish the offending supervisor.²³⁴ Some would also impose an affirmative duty to announce a policy against harassment.²³⁵ Under this approach, an employer who takes appropriate remedial action when it learns that harassment has occurred will not have violated Title VII, particularly if it had previously announced that its employees were not to engage in sexual harassment.²³⁶

Some courts, however, have applied a strict liability approach with regard to supervisors' sexual harassment of employees under their supervision.²³⁷ For example, in 1979 the Ninth Circuit held in *Miller v. Bank of America*²³⁸ that an employer is liable, under a *respondeat superior* theory, for the harassing acts of its super-

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234. *Cf. Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126 (N.D. Ohio 1976). In *Bell*, when the plaintiff first complained of co-workers' harassment because she was married to a black, but she refused to name the co-workers, the employer called in a community minister to help, reminded all employees of the rules against harassment, and transferred the plaintiff to another shift. *Id.* at 1128-29. When the plaintiff, after abandoning a grievance proceeding, complained again and named two co-workers, those individuals denied that they had harassed her. *Id.* at 1129. The personnel manager reminded them of the rules and had them sign statements. *Id.* He did not discipline them because discipline without evidence of misbehavior would violate the union agreement. *Id.* at 1129-30, 1137. He also posted the rules against harassment and again called the minister. *Id.* at 1130. The defendants were held to have "responded swiftly and reasonably to plaintiff's claims." *Id.* at 1137.
235. *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (D. Colo. 1978) (would require employer to "inform employees that management is receptive to such complaints and, if proved true, that management will rectify the situation"); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977); *cf. DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980) (harassment by nonsupervisory personnel).
236. *Neeley v. American Fidelity Assurance Co.*, 17 Empl. Prac. Dec. ¶ 8395, 17 Fair Empl. Prac. Cas. 482 (W.D. Okla. 1978); *Price v. John F. Lawhon Furniture Co.*, 16 Empl. Prac. Dec. ¶ 8342 (N.D. Ala. 1978) (no Title VII violation when employer had strict policy against sexual fraternization among its employees and plaintiff had never complained to employer). Judge MacKinnon, concurring in *Barnes v. Costle*, 561 F.2d 983, 1000 (D.C. Cir. 1977), would hold that an employer is not liable if it posts a policy against harassment and provides a workable mechanism for victims to make prompt complaints so that the employer can rapidly warn the alleged harasser against harassment.
237. *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522, 537 (W.D. Pa. 1973), *modified on other grounds*, 541 F.2d 394 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041, *rehearing denied*, 430 U.S. 911 (1977); *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177, 1186-87 (W.D. Pa. 1973). In *Williams v. Saxbe*, Judge Richey seemed to adopt a strict liability position in stating, "if this was a policy or practice of plaintiff's supervisor, then it was the agency policy or practice." But it would be wrong to read *Williams* so broadly, because the employer there probably had at least constructive knowledge of the supervisor's behavior, since the plaintiff alleged "that the supervisor's conduct was a policy or practice imposed on the plaintiff and other women similarly situated." 413 F. Supp. 654, 660 & n.8 (D.D.C. 1976). The majority of the court of appeals in *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977), stated that employers are generally liable for their supervisors' acts, but that an employer could rebut liability by showing that once it knew of the acts, it corrected the problem. Judge MacKinnon, concurring, argued that the employer's responsibility should not go beyond the normal common law rules of vicarious liability. *Id.* at 999-1000.
238. 660 F.2d 211 (9th Cir. 1979).

visory personnel who are "authorized to hire, fire, discipline, or promote [employees], or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy."²³⁹ The court in *Miller* held that the employee need not first exhaust internal grievance procedures²⁴⁰ and made clear that the employer is liable for a supervisor's sexual harassment even if the employer has no knowledge of the misconduct and therefore has had no opportunity to correct the problem.²⁴¹

By adopting the *Miller* approach in its guidelines, the EEOC rejects those cases that would not hold an employer in violation of Title VII unless it had knowledge of sexual harassment committed by a supervisor.²⁴² In neither *Bundy v. Jackson*²⁴³ nor *Brown v. City of Guthrie*²⁴⁴ was the court faced with the question of whether to follow the guidelines' provisions. Both cases involved employers who had knowledge of the supervisor's harassment and had an opportunity to correct the situation but failed to do so.²⁴⁵ Because the guidelines' approach is consistent with non-harassment cases,²⁴⁶ however, it is likely that courts will follow it. Even so, a lawyer attempting to resolve a sexual harassment complaint in an efficient manner should make sure, before he or she sends a client to the EEOC, that the employer (or at least a superior of the harassing supervisor or agent) has knowledge of the problem and has failed to correct it.²⁴⁷ This will allow the employer an opportunity to correct the problem early, and, if he

239. *Id.* at 213.

240. *Id.* at 213-14.

241. *Id.*

242. See notes 231-32 and accompanying text *supra*. Interestingly, the Office of Federal Contract Compliance Programs' proposed regulation prohibiting sexual harassment would require that the government contractor have actual or constructive notice before it is responsible for the harassment. 44 Fed. Reg. 77,017 (1979) (if adopted, to be codified in 41 C.F.R. § 60-20.8). See generally Siniscalco, *Sexual Harassment & Employer Liability: The Flirtation that Could Cost a Fortune*, 6 EMPLOYEE REL. L.J. 277, 280-81 (1980).

243. 24 Empl. Prac. Dec. ¶ 31,439 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981).

244. 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).

245. *Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439, at 18,530-31 (D.C. Cir. Jan. 12, 1981); *Brown v. City of Guthrie*, 22 Fair Empl. Prac. Cas. 1627, 1631 (W.D. Okla. 1980).

246. See note 227 and accompanying text *supra*.

247. This is especially true given the fact that various self-help measures by harassment victims appear to have great success. For example, 70% of the female and 29% of the male respondents to a federal survey reported that their request of an investigation by their own organization "made things better"; 54% of the females and 67% of the males reported improvement resulting from asking or telling the harasser to stop. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 12-13. The respective reports of improvement upon reporting harassment to the supervisor or other officials were 53% and 35%. *Id.* at 12.

fails to do so, will present a stronger case for the employee should the claim reach the courts.

2. Employer's Liability for Acts of Co-Workers

Subsection (d) of the guidelines provides that an employer may also be liable for sexual harassment by employees other than supervisors or agents: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."²⁴⁸ Because the EEOC admits that such employees are not acting as agents of the employer, and Title VII holds an employer responsible only for its own acts and those of its agents,²⁴⁹ the EEOC must view such employees' conduct as conduct of the employer itself.

248. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(d)). The guideline, however, makes no provision for an employer who is bound by a union contract to have more evidence before disciplining an employee than the EEOC would require to prove a violation. See note 234 *supra* (discussion of *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126 (N.D. Ohio 1976)). *Quaere* whether the EEOC would then find that the union was also in violation of Title VII. See generally Note, *Job-Related Sexual Harassment & Union Women: What are Their Rights?*, 10 GOLDEN GATE U. L. REV. 929 (1980); see also MACKINNON, *supra* note 1, at 49-50.

The only difference between the cases and the guideline is that the cases require swift or prompt action, whereas the guideline requires, arguably more restrictively, immediate action. See *Tomkins v. Public Serv. Gas & Elec. Co.*, 568 F.2d 1044, 1049 (3d Cir. 1977) (employer must take "prompt" action to rectify harassment by supervisor); *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126, 1137 (N.D. Ohio 1976) (employer properly acted "swiftly"); *Continental Can Co. v. Minnesota*, 297 N.W.2d 241, 250-51 (Minn. 1980) (employer's "failure to respond promptly to [plaintiff's] complaints regarding the grabbing incident 'connected' [the employer] to the act of sexual harassment perpetrated by its employee" and thus violated Minnesota Human Rights Act); cf. *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) (employer can rebut liability for supervisor's harassment if "consequences are rectified when discovered"). "Prompt" has been defined as "to act immediately, responding on the instant" and as "ready and quick to act as occasion demands. The meaning of the word depends largely on the facts of the case." BLACK'S LAW DICTIONARY 1379 (rev. 4th ed. 1968). For example, the court in a copyright case held that a deposit of two copies of the best edition of a work, made 27 years after its publication, met the statutory requirement of a "prompt" deposit. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 409 & n.4 (2d Cir. 1946). "Immediate" is defined as "[p]resent, at once; without delay; not deferred by any interval of time." BLACK'S LAW DICTIONARY 884 (rev. 4th ed. 1968). In this sense, the word denotes that action is or must be taken either instantly or without any considerable loss of time. On the other hand, "immediate" has also been construed as "[a] reasonable time in view of particular facts and circumstances of case under consideration." *Id.* This construction would be the most appropriate for the sexual harassment guideline.

249. See Civil Rights Act of 1964 §§ 701(b), 703(a)(1)-(2), 42 U.S.C. §§ 2000e(b), 2000e-2(a)(1)-(2) (1976).

Both prior judicial²⁵⁰ and EEOC decisions²⁵¹ unanimously agree that the employer is responsible for harassment by a mere

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250. *DeGrace v. Rumsfeld*, 614 F.2d 796, 804-05 (1st Cir. 1980) (remanding case to see if employer had taken sufficient steps to cure the problem, when external investigation had been dropped at black plaintiff's request, but employer could have conducted internal investigation concerning threatening notes); *Silver v. KCA, Inc.*, 586 F.2d 138, 140-42 (9th Cir. 1978) (derogatory characterization by plaintiff's co-workers, of plaintiff's black trainee as a "jungle bunny," was "not the sort of conduct which Title VII was enacted to prohibit" and in any event the employer could not be held liable, in the absence of knowledge, for even continuing racial harassment); *Higgins v. Gates Rubber Co.*, 578 F.2d 281, 283 (10th Cir. 1978) (no liability for firing black plaintiff for hitting co-worker harasser over the head with a wrench, because no finding that employer was aware of racial harassment); *Kidd v. American Air Filter Co.*, 23 Empl. Prac. Dec. ¶ 31,126, 23 Fair Empl. Prac. Cas. 381 (W.D. Ky. 1980) (employer not liable where it made appropriate attempt to protect German plaintiff from co-workers' alleged harassment because of her national origin); *St. J. Enriquez v. Transit Mixed Concrete Co.*, 492 F. Supp. 390 (C.D. Cal. 1980) (employer not liable for co-workers' harassment of plaintiff because of his national origin, where he did not notify his supervisors); *United States v. City of Buffalo*, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (police department "failed either to conduct a full investigation or to take action upon completion of the investigation" of racial harassment by co-workers); *Friend v. Leidinger*, 446 F. Supp. 361, 376, 383-84 (E.D. Va. 1977) (employer had done what it could to prevent white co-workers' racial harassment and had adequately punished several harassers by reducing their pay; unless the employees complain, the employer cannot be held liable for co-workers' racist comments), *aff'd*, 588 F.2d 61 (4th Cir. 1978); *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126, 1137 (N.D. Ohio 1976) (no illegal race discrimination found where employer had investigated and tried to prevent recurrence of co-workers' acts); *Howard v. National Cash Register Co.*, 388 F. Supp. 603, 604-05, 607 (S.D. Ohio 1975) (employer not liable for co-workers' harassment of black plaintiff, where employer disciplined one who used a racist term and because of plaintiff's complaint conducted an investigation, which it terminated when co-workers denied the harassment, and employer warned employees that harassment would be disciplined); *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177, 1186-87 (W.D. Pa. 1973) (employer not liable for co-workers' harassment of Hungarian plaintiff in violation of employer's policy when employer was not always aware of harassment but when informed took steps to stop it; in any event, the harassment was not motivated by plaintiff's national origin); *see Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 756 (W.D. Va. 1976) (no Title VII violation where one of over 450 employees, a white, on several occasions made disparaging references to a black co-worker); *Walker v. Columbia Univ.*, 407 F. Supp. 1370, 1377 (S.D.N.Y. 1976) ("residuary male chauvinism on the part of individual employees . . . does not make a pattern or practice chargeable to an employer"); *cf. Anderson v. Methodist Evangelical Hosp., Inc.*, 464 F.2d 723 (6th Cir. 1972) (knowledge of employer's subordinates of racial animosity between plaintiff and co-workers sufficient); *Lucero v. Beth Israel Hosp.*, 479 F. Supp. 452 (D. Colo. 1979) (employer liable for racial harassment of non-blacks by co-workers when department director failed to take corrective action); *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1979) (liability found where supervisors knew of and condoned co-workers' sexual harassment); *Continental Can Co. v. Minnesota*, 297 N.W.2d 241, 249 (Minn. 1980) (under state fair employment practices law, although an employer has no duty to provide a "pristine working environment," it does have a "duty to take prompt and appropriate action" when it knows or should know that "repeated and unwelcome sexually derogatory remarks and sexually motivated physical conduct are directed at an employee because she is female"; employer failed to take sufficient corrective action after plaintiff complained of co-workers' sexually derogatory remarks, touching her between the legs and on her posterior, breaking her car's headlights, and threatening her with a gun). A post-guideline decision is in accord. *EEOC v. Olin Corp.*, 4 EMPL. PRAC. GUIDE (CCH) (26 Empl. Prac. Dec.) ¶ 32,104, at 22,032 (W.D.N.C. 1980). *But see Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah

co-worker only if the employer has been made actually or constructively aware of the problem and has failed to take prompt, appropriate action. Arguably, the inaction of the employer, his or her failure to take reasonable remedial steps, acts as ratification of the harassment.²⁵² The position of the courts is exemplified by the opinion of the United States Court of Appeals for the First Circuit in a racial harassment case:

It may not always be within an employer's power to guarantee an environment free from all bigotry. He cannot change the personal beliefs of his employees; he can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy. . . . But once an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think he can be charged with discriminating on the basis of race.²⁵³

The courts also have followed this approach in sexual harassment cases.²⁵⁴

3. Employer's Liability for Acts of Non-Employees

The EEOC guidelines provide the same standard of liability for acts of non-employees as they do for acts of co-workers: "An

1971) (progress under Title VII will be "slowed, if not stopped," if employer "is able to hide behind the shield of the individual employee action").

No court has held an employer strictly liable for harassment by a co-worker who is not in a position to affect the employment advancement of the victim. *See Smith v. Rust Eng'r Co.*, 18 Empl. Prac. Dec. ¶ 8698, 20 Fair Empl. Prac. Cas. 1172 (N.D. Ala. 1978) (no Title VII violation where male co-worker who made the advances had the same job classification as plaintiff and did not promise her any employment-related benefits). One case carried this position to its illogical extreme by holding that there could be no violation of Title VII where the plaintiff refused her male co-worker's advances, and he subsequently became promoted and, in retaliation, refused to reappoint her to her job. The court found the lack of employment ramifications at the time of the original advances decisive. *Cordes v. County of Yavapai*, 17 Fair Empl. Prac. Cas. 1224 (D. Ariz. 1978).

251. EEOC Decision No. 74-05, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6387 (1973) (employer liable for constructive discharge of Spanish-surnamed plaintiff who quit because of "kidding" by black co-workers, when employer had failed to take adequate remedial steps); 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 84.10, at 17-2 & n.6 (rev. ed. 1980) (ethnic jokes and insults).

252. *See W. SEAVEY, AGENCY* § 37 (1964); *cf. A. CORBIN, CONTRACTS* § 229 (1952) (ratification by principal of unauthorized contract by an agent).

253. *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980).

254. *See, e.g., Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 935-42 (D.N.J. 1978) (finding Title VII liability where supervisors not only failed to take steps to correct but condoned sexual harassment); *Continental Can Co. v. Minnesota*, 297 N.W.2d 241 (Minn. 1980) (employer liable under state fair employment practices law for failing to take appropriate corrective measures against sexual harassment).

employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action."²⁵⁵ On its face, this guideline makes the novel suggestion that an employer can be found to have violated Title VII, not because of something the employer or its employees have done, but because the employer has failed to correct the acts of non-agent business invitees such as independent contractors, sales and repair persons, customers, clients, or patients, as well as non-invitees such as trespassers. In the supplementary information accompanying the final guidelines, the EEOC states that an employer's liability "for acts of non-employees towards employees . . . will be determined on a case-by-case basis, taking all facts into consideration."²⁵⁶ The guideline also provides that "[i]n reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees."²⁵⁷ The phrase "any other legal responsibility" only obfuscates what at first would seem to be an indication that the employer would be responsible only for the acts of those persons over which he or she has clear control.²⁵⁸

This subsection appears to have been at least partially inspired by the recent case of *EEOC v. Sage Realty Corp.*,²⁵⁹ decided by the United States District Court for the Southern District of New York. In denying the defendants' motion for summary judgment against the EEOC and an intervening individual plaintiff, Judge Ward held that a woman who alleged that she was sexually harassed by customers, because her employer required her to wear a tight-fitting, revealing uniform, stated a cause of action under Title VII.²⁶⁰ The plaintiff's job required her to serve as combination receptionist, maintenance worker, and bouncer in the elevator lobby of an office building.²⁶¹ At a trial on the merits, the plaintiff

255. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(e)); see text accompanying note 248 *supra*.

256. 45 Fed. Reg. 74,676 (1980).

257. *Id.* at 74,677 (to be codified in 29 C.F.R. § 1604.11(e)).

258. For example, a school would have more control over the in-school behavior of its students toward teachers than would a circus over the actions of parade-watchers toward circus employees marching through city streets. Cf. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69 (4th ed. 1971) (vicarious liability); W. SEAVEY, AGENCY §§ 3E, 84C, 86 (1964) (importance of right to control in determination of masters' and principals' liability for acts of servants and agents).

259. 507 F. Supp. 599 (S.D.N.Y. 1981).

260. 23 Empl. Prac. Dec. ¶ 31,046 (S.D.N.Y. 1980).

261. 507 F. Supp. 599, 603 (S.D.N.Y. 1981). Not only were there no similarly situated males, but no male employees had been required to wear revealing uniforms. *Id.* at 604. As the court stated: "[B]ut for her womanhood [plaintiff] would not have been required to [wear] . . . a uniform that subjected her to sexual harassment." *Id.* at 608.

proved that when she wore the uniform in question, an octagonal, red, white, and blue Bicentennial poncho with side slits that revealed her thighs and part of her buttocks,²⁶² male passers-by propositioned her and made sexual puns.²⁶³ The plaintiff was so humiliated that she was "unable to perform her duties properly."²⁶⁴ When she complained to the employer and refused to continue to wear the uniform, she was fired.²⁶⁵ The court, holding that the employer had violated Title VII, found the employer liable for sexual harassment by its business invitees because the employer took no action after it had knowledge of the harassment, and because the harassment was prompted by the employer's requiring the plaintiff to wear the sexy outfit. The action the court asked of the employer was to provide the claimant a non-revealing uniform.²⁶⁶

One post-guideline EEOC decision involved facts similar to those in *Sage Realty*. A female clerical employee's male supervisor required her to wear a revealing costume while she acted as a hostess to visiting VIPs.²⁶⁷ When she wore the costume, she was embarrassed and verbally abused by male visitors.²⁶⁸ The supervisor also retaliated against the woman for rejecting his sexual advances.²⁶⁹ Although finding the employer liable for the visitors' harassment would have been consistent with the guidelines and with *Sage Realty*, the EEOC focused only on the supervisor's acts and found the employer strictly liable for them.²⁷⁰

The guideline concerning employer liability for the conduct of non-employees does not expressly restrict the employer's liability

262. *Id.* at 604.

263. *Id.* at 605 & n.11. One passer-by told the plaintiff that he would "run it up the flag pole any time [she] want[ed] to." *Id.*

264. *Id.* at 605, 606 n.12. The court distinguished those cases in which an employer imposes "reasonable grooming and dress requirements on its employees, where those requirements have a negligible effect on employment opportunities and present no distinct employment disadvantages." *Id.* at 608. See note 179 and accompanying text *supra*.

265. 507 F. Supp. 599, 605-06 (S.D.N.Y. 1981).

266. *Id.* at 607-08. The guideline does not appear to give special consideration to those situations in which the employee is an entertainer who has agreed to wear a sexy outfit that is considered necessary in order to perform the job, arguably raising a BFOQ question. See note 38 *supra*. See also 1 A. LARSON, EMPLOYMENT DISCRIMINATION § 15.10 (rev. ed. 1980); MACKINNON, *supra* note 1, at 209. Similarly, the guideline seems to require that a burlesque hall owner take "appropriate corrective action" when a customer makes an unwelcome sexual comment to an exotic dancer. Yet the different concerns in those situations were hinted at during closing argument in *Sage Realty*, when the judge told defense counsel that if her client had asked the plaintiff "to perform in a pageant on a stage, I could have no quarrel with his doing that. But he took people who were employed not in a theatre where you expect to show yourself" 507 F. Supp. 599, 610 n.17 (S.D.N.Y. 1981).

267. EEOC Decision No. 81-17, 2 Empl. Prac. Guide (CCH) ¶ 6757, at 4799 (Feb. 6, 1981). The costume was a halter top and a midi-skirt with a slit revealing the thighs. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

to cases where the harassment is brought about by the employer's act. Yet, in order to make an employer answerable for the acts of non-agents, the facts must support a finding that the employer ratified the harassment.²⁷¹ The EEOC's theory seems to be that failure to take appropriate action²⁷² amounts to ratification. For example, it might be reasonable to require an employer to wash off or paint over racist or sexual graffiti²⁷³ scrawled by a business invitee or a trespassing vandal. Yet one must wonder what action is appropriate when a customer makes a crude comment to an employee and what inaction is sufficient to ratify the harassment. Certainly an employer who requires an employee to accept sexual assaults or harassment by a customer as a condition of employment would violate Title VII.²⁷⁴ These are the circumstances of *Sage Realty*. Aside from this situation, it is difficult to predict what action or inaction by an employer would render it liable under the guidelines for the acts of non-employees. Perhaps the EEOC requires that the employer play a paternalistic role in protecting its employees from the sexual behavior of others.

In response to questions of what action would be appropriate under the interim guidelines' substantively identical provisions concerning harassment by non-employees and by co-workers, the EEOC merely stated, "What is considered to be 'appropriate' will be seen in the context of specific cases through Commission decisions."²⁷⁵ As a result of the vagueness of the guideline, employers must watch for the EEOC's case-by-case interpretations. Ex-chairperson Eleanor Holmes Norton has said that the EEOC personnel are "acutely aware of the need to apply the rules of common sense and fairness."²⁷⁶

The EEOC guideline seems to go beyond *Sage Realty* by making a blanket extension of the employer's responsibility, absent its taking "immediate and appropriate corrective action," to include responsibility for sexual harassment by non-agent customers and other non-employees. That reading should be rejected. While the eradication of all sexual harassment is a desirable end, Congress,

271. See notes 250-52 and accompanying text *supra*.

272. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(e)).

273. See *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177, 1187 (W.D. Pa. 1973) (employer painted over insulting graffiti); *Rattner v. Trans World Airlines*, No. 4135-J (N.Y. City Comm'n on Human Rights Sept. 11, 1973) (unlawful to require Jewish employee to work where supervisor knew employee would be exposed to anti-Semitic graffiti).

274. See *MACKINNON*, *supra* note 1, at 34-35 (when a waitress complained to her boss that a customer had put his hand up her skirt, the waitress was punished for her non-compliance).

275. 45 Fed. Reg. 74,676 (1980).

276. Olson, *Sexual Harassment Rules Opposed*, *The Sun* (Baltimore), Oct. 13, 1980, at A12, col. 5.

in Title VII, prohibited only discriminatory acts by employers and their agents.²⁷⁷ Requiring the employer to be responsible for the acts of its non-employees, where the employer does not cause, encourage, or promote the harassment, is without a basis in the statute.

4. Preventive Measures to Combat Harassment

Although the EEOC does not reward an employer who takes preventive measures against sexual harassment, by easing its standard of holding employers strictly liable for acts of supervisory employees and agents, the EEOC exhorts employers to take such measures. The guideline provides that

[a]n employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing the appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.²⁷⁸

The EEOC has, by other action, specifically directed federal agencies to take preventive measures against sexual harassment.²⁷⁹

Because the guideline asserts that the employer should take preventive steps, rather than shall take these steps, the guideline may be understood to mean that employers ought to rather than must take preventive measures.²⁸⁰ This understanding is supported by the following supplementary information accompanying the identical provision in the interim guidelines, which speaks of voluntary action:

Consistent with the policy of voluntary compliance under Title VII, § 1604.11(e) recognizes that the best way to

277. See Civil Rights Act of 1964 §§ 701(b), 703(a)(1)-(2), 42 U.S.C. §§ 2000e(b), 2000e-2(a)(1)-(2) (1976).

278. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(f)).

279. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 19-20, E-11-E-13. Most of the agencies have taken such steps. *Id.* at F-1-F-6.

280. "Should" is defined as

the past tense of shall, ordinarily implying duty or obligation; although usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from "ought" It is not normally synonymous with "may"; and although often interchangeable with the word "would," it does not ordinarily express certainty as "will" sometimes does.

BLACK'S LAW DICTIONARY 1549 (rev. 4th ed. 1968) (citations omitted). The understanding that the word "should" means something less than "shall" is illustrated by the protest of the chairman of the American Bar Association Special Committee on Public Interest Practice of the substitution of "should" for "shall" in the proposed ethics rule concerning pro bono representation: "We believe that substituting 'should' for 'shall' would understandably weaken . . . what was intended as a statement of obligation to a mere wish, with little or no practical significance." 67 A.B.A.J. 536 (1981).

achieve an environment free of sexual harassment is to prevent the occurrence of sexual harassment by utilizing appropriate methods to alert the employees to the problem and to stress that sexual harassment, in any form, will not be tolerated.²⁸¹

Yet, as those comments continue, they seem to indicate an intent to make mandatory the taking of some type of preventive measures: "This paragraph (e) of § 1604.11 *requires* an employer to take all steps necessary for the prevention of sexual harassment and gives . . . examples of steps which might be deemed necessary. . . ."²⁸² The language of the supplementary information accompanying the final guideline on employers' preventive action also indicates that such action may be considered mandatory:

Section 1604.11(e) of the Interim Guidelines, which sets out suggestions for programs to be developed by employers to prevent sexual harassment, now becomes § 1604.11(f). The Commission has received many comments which state that this section is not specific enough. The Commission has decided that the provisions of this section should illustrate several kinds of action which might be appropriate, depending on the employer's circumstances. The emphasis is on preventing sexual harassment, and § 1604.11(f) intends only to offer illustrative suggestions with respect to possible components of a prevention program. Since each workplace *requires* its own individualized program to prevent sexual harassment, the specific steps to be included in the program should be developed by each employer.²⁸³

If the EEOC intends to mandate preventive acts, it must then consider an employer's failure to take preventive measures against sexual harassment *per se* violative of the guidelines and Title VII, even if no such harassment actually occurred. Because a finding of a violation of section 703 in the absence of any discrimination whatsoever would be inconsistent with the statutory language,²⁸⁴ that cannot be a fair reading of the guideline. Nonetheless, even if the EEOC does not purport to require employers to take steps to prevent sexual harassment, the stringency of the guideline encourages employers to minimize sexual harassment of

281. 45 Fed. Reg. 25,024 (1980).

282. *Id.* (emphasis added); see 1 A. LARSON, EMPLOYMENT DISCRIMINATION § 41.64, at 8-109 (rev. ed. 1980) (terming the interim EEOC guidelines "somewhat schizophrenic on the topic of preventive measures" in imposing "a detailed and emphatic list of obligations on the employer" without providing "any assurance that such solicitude will purchase immunity from attack").

283. 45 Fed. Reg. 74,676 (1980) (emphasis added). For more specific suggestions, see SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 102-04, H-7.

284. See notes 27 & 28 *supra*.

their employees in any way possible. Many employers have already responded to the guideline by introducing preventive measures against sexual harassment.²⁸⁵

V. ALTERNATIVES TO TITLE VII RELIEF

Victims of sexual or non-sexual harassment who are not protected by Title VII have numerous legal alternatives that they can pursue to obtain relief. This article cannot address all of these alternatives, which include criminal actions,²⁸⁶ suits under the

285. Lublin, *Resisting Advances: Employers Act to Curb Sex Harassing on Job; Lawsuits, Fines Feared*, Wall St. J., Apr. 23, 1981, at 1, col. 1. Also, the courts may use the guidelines' section on preventive measures as a framework for injunctions, outlining what steps employers who have been found guilty of discrimination must take. The court of appeals in *Bundy* did so. *Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439 (D.C. Cir. Jan. 12, 1981), *on remand*, 25 Empl. Prac. Dec. ¶ 31,710 (D.D.C. Mar. 23, 1981); see Comment, *Sexual Harassment in the Employment Context: An Analysis of the New Title VII Cause of Action*, 32 BAYLOR L. REV. 611-14 (1980).

286. The possibilities of criminal sanctions against the harasser, which are intended to provide a remedy for the general public rather than for the individual victim, and of the availability of government funds for crime victims are beyond the scope of this article. For a discussion of these issues, see, for example, *Gates v. State*, 110 Ga. App. 303, 138 S.E.2d 473 (1964) (a man's intentional, unexcused touching of a woman on the buttocks constitutes criminal battery); Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 886-99 (1980); Annot., 99 A.L.R.3d 762 (1980) (gestures as punishable obscenity). See also MACKINNON, *supra* note 1, at 159, 161-64. Of course, *Gates* poses equal protection problems unless criminal sanctions would be equally applicable to a similar touching by a woman. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (gender-based state action violates equal protection clause unless sex-based classification is substantially related to achievement of important governmental objectives).

federal post-Civil War Civil Rights Acts,²⁸⁷ actions under state²⁸⁸ and local²⁸⁹ fair employment practices laws, and, in situations in which the harasser acts on behalf of the government, suits under state²⁹⁰ and federal²⁹¹ constitutional provisions guaranteeing equal

287. 42 U.S.C. §§ 1981-1988 (1976). Section 1981 applies to private employers who discriminate on the basis of race, but not on the basis of sex. *E.g.*, *O'Connell v. Teachers College*, 63 F.R.D. 638, 640 (S.D.N.Y. 1970). It has been used in cases of racial harassment by an employer. *Crocker v. Boeing Co.*, 23 Fair Empl. Prac. Cas. 1783 (E.D. Pa. 1979) (awarding \$1000 punitive damages).

Sections 1985 and 1986, concerning conspiracy to deprive one of federal rights and neglecting to stop such a conspiracy, cover sex discrimination by private employers. *E.g.*, *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 949-50 (D.N.J. 1978). *But see* *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979) (conspiracy merely to deprive one of rights guaranteed by Title VII is not actionable under § 1985).

Section 1983 also applies to sex discrimination, but only with regard to state action. *Cussler v. University of Md.*, 430 F. Supp. 602 (D. Md. 1977). It has been held applicable to sexual harassment. *Woerner v. Brzeczek*, 26 Fair Empl. Prac. Cas. 897 (N.D. Ill. Jul. 21, 1981). Because of sovereign immunity, a state or municipal employer is not liable for its employees' discriminatory acts unless these acts are shown to be the custom or policy of the employer; *respondeat superior* is inapplicable. *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-94 (1978). Action against the employer under the federal Occupational Safety and Health Act's prohibition of systematic threats to worker goals, integrity, or well-being has been suggested. *MACKINNON*, *supra* note 1, at 159; *see* 29 U.S.C. § 661 (1976).

288. For the most part, state fair employment practices laws follow Title VII. *E.g.*, MD. ANN. CODE art. 49B, §§ 14-17 (1979). The Maryland Commission on Human Relations has held that an employer's failure to take action when it received a complaint of sexual harassment of a barmaid by a cook violates the state fair employment practices law. *Boyd v. Kattavia P.S. Inc.*, No. E77-141 (Md. Comm'n on Human Relations Jan. 9, 1980). In another case, a Baltimore City court granted an injunction against transferring an employee until the Commission held a hearing on her charge that the proposed transfer was in retaliation for her having complained that "her supervisor had repeatedly touched her in a sexual manner." *James, Court Extends Bar to Job Shift in Harassment Case*, *The Evening Sun* (Baltimore), Feb. 18, 1981, at D12, col. 1. The Maryland Commission received 170 complaints of sexual harassment in 1980. *Id.*

Maryland Governor Hughes has issued an executive order prohibiting sexual harassment, as defined in the EEOC's interim guidelines, within Maryland's executive branch. Exec. Order No. 01.01.1980.16 (Oct. 20, 1980). The governor of Rhode Island has issued Executive Order No. 80-9, prohibiting sexual harassment of state employees. 3 EMPL. PRAC. GUIDE (CCH) ¶ 27,680 (1980). The governor of South Dakota has signed Executive Order 81-08 to the same effect. 3 EMPL. PRAC. GUIDE (CCH) ¶ 27,955 (1981). The California Fair Employment and Housing Commission has promulgated very detailed regulations prohibiting harassment because of sex. *Siniscalco, Sexual Harassment & Employer Liability: The Flirtation that Could Cost a Fortune*, 6 EMPLOYEE REL. L.J. 277, 281-82 (1980). Colorado and Pennsylvania have adopted the EEOC final guidelines on sexual harassment. 3 EMPL. PRAC. GUIDE (CCH) ¶¶ 21,065.11 & 27,280 (1980). Michigan, which adopted the EEOC interim guidelines on sexual harassment, recently amended its state law to cover all employers, even those having only one employee. *Id.* ¶ 24,200.04.

289. *E.g.*, BALTIMORE CITY, MD., CODE art. 4, § 10 (1976).

290. *E.g.*, MD. CONST., DECL. OF RIGHTS art. 24 (due process). The Maryland due process clause has been construed to include an equal protection guarantee. *Board of Supervisors v. Goodsell*, 284 Md. 279, 396 A.2d 1033 (1979).

291. The fourteenth amendment pertains to state action. U.S. CONST. amend. XIV, § 1. Sex discrimination suits may be brought against federal defendants not covered by Title VII, such as members of Congress, under the equal protection component of the fifth amendment's due process clause. *Davis v. Passman*, 442 U.S. 228 (1979).

protection of the law and under state equal rights amendments.²⁹² A brief discussion of common law tort and contract actions, however, may be illuminating.

Various tort theories may be applicable to harassment: assault, battery, false imprisonment, negligence, slander, intentional infliction of emotional distress, and interference with contract. Harassment victims have already sought and obtained relief under most of these theories. One who is wrongfully touched may sue for battery,²⁹³ one reasonably²⁹⁴ put in fear of offensive touching may sue for assault.²⁹⁵ In one incident in Maryland, a supervisor chained a black worker to a bench while commenting, "Your people look natural that way."²⁹⁶ That racial harassment would also constitute false imprisonment²⁹⁷ — a tort which might easily be committed in a sexual harassment situation if, for example, a woman's co-worker locked her in a closet in order to kiss her.²⁹⁸ If the tort occurred on the job, the woman might have a

292. *E.g.*, MD. CONST., DECL. OF RIGHTS art. 46.

293. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 9, at 36 n.85 (4th ed. 1971); Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 136 n.62 (1977); Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 893, 898-99 (1980); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 168-69 (1979). See also MACKINNON, *supra* note 1, at 165, 167.

294. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 10, at 39 (4th ed. 1971) (the apprehension of a battery, which constitutes an element of assault, must be "one which would normally be aroused in the mind of a reasonable person").

295. See *Clark v. World Airways, Inc.*, 24 Empl. Prac. Dec. ¶ 31,385 (D.D.C. 1980) (denying corporate employer's motions for judgment n.o.v., new trial, and remittitur of jury verdict of \$52,500 against corporate employer of individual who touched plaintiff and made sexual advances toward her, in an action for assault); *Skousen v. Nidy*, 90 Ariz. 215, 367 P.2d 248 (1962) (affirming \$5000 verdict for 65 year-old female employee against male employer for assault by placing his hands upon her private parts and attempting to seduce her by force); cf. *Guyette v. Stauffer Chem. Co.*, 4 EMPL. PRAC. GUIDE (CCH) (27 Empl. Prac. Dec.) ¶ 32,138 (D.N.J. June 17, 1981) (pendent jurisdiction in Title VII sexual harassment suit of plaintiffs' claims of assault and battery, negligence, gross negligence, and intentional interference with contractual relations; plaintiffs alleged harassment by their "work product being stolen or otherwise ruined" and that they were endangered by the placing of hazardous chemicals above their desks and in their work areas). See generally MACKINNON, *supra* note 1, at 165-67; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 10, at 38 & n.9, 39 & n.12, 40 & n.20 (4th ed. 1971); see also Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 893, 899-902 (1980); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 169, 170-71 & n.100 (1979); Annot., 5 A.L.R.4th 708 (1981).

296. *Robinson, Baltimore County Settles Racism Suit*, The Sun (Baltimore), Dec. 3, 1980, at E8, col. 1.

297. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 11 (4th ed. 1981).

298. See *Meyer v. Graphic Arts Int'l Union*, 88 Cal. App. 3d 176, 151 Cal. Rptr. 579 (1979) (plaintiff alleged assault, battery, false imprisonment, and rape by agents and officers of her employer; court reversed granting of demurrer).

cause of action against her employer under the principle of *respondeat superior*,²⁹⁹ as well as against the individual tortfeasor. Similarly, if an employee is criminally sexually assaulted on the job, he or she might have a cause of action against his or her employer for negligence for failure to take adequate precautions against the crime.³⁰⁰ Some types of sexual statements made concerning an employee may be defamatory.³⁰¹ For example, such lies as those told by Dolly Parton's boss in the cinematic comedy, "9 to 5," who bragged that he and she were having an extramarital affair, would be actionable as slander. In order to recover for harassment under the theory of intentional infliction of emotional distress,³⁰² a plaintiff must prove that the defendant's conduct was "intentional or reckless" and "extreme and outrageous" and that it caused the plaintiff severe emotional distress.³⁰³ The tort seems tailor-made for the case of an employer or supervisor who hounds an employee with the intention of substantially interfering with his or her work or of intimidating or offending him or her³⁰⁴ because, where the defendant is "in a peculiar position to

299. See *Clark v. World Airways, Inc.*, 24 Empl. Prac. Dec. ¶ 31,385 (D.D.C. 1980) (jury found corporate employer liable for assault by its agent on its employee); Siniscalco, *Sexual Harassment & Employer Liability: The Flirtation that Could Cost a Fortune*, 6 EMPLOYEE REL. L.J. 277, 288 (1980); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 174-75 (1979). See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 70, at 464-66 (4th ed. 1971). If the tortfeasor who commits an intentional tort "acts from purely personal motives, . . . in the ordinary case, . . . the master is not liable." *Id.* at 465. Some courts, however, have held the employer liable "where the servant, for strictly personal reasons . . . attacks the plaintiff in a quarrel which arises out of the employment." *Id.* at 465-66. But see *Barnes v. Costle*, 561 F.2d 983, 995-96 (D.C. Cir. 1977) (MacKinnon, J., concurring); Seymour, *Sexual Harassment: Finding a Cause of Action under Title VII*, 30 LAB. L.J. 139, 141 & n.4 (1979).

300. See RESTATEMENT (SECOND) OF TORTS §§ 314(B), 448 (1965); cf. *Clark v. World Airways, Inc.*, 24 Empl. Prac. Dec. ¶ 31,385 (D.D.C. 1980) (jury found for corporate employer with regard to charge of negligent supervision of harasser, but against it for assault); *Scott v. Watson*, 278 Md. 160, 167, 359 A.2d 548, 553 (1976) (landlord may be liable in negligence for injury caused to tenant by third party criminal).

301. See *MACKINNON*, *supra* note 1, at 30; Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 892 n.70 (1980).

302. Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 171-72 & n.107 (1979); Annot., 40 A.L.R.3d 1290, 1318 (1971). See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 (4th ed. 1971).

303. *Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977) (suit against employer and supervisor for emotional distress resulting from supervisor's and co-workers' ridiculing plaintiff's stutter failed because there was insufficient proof that the resulting emotional distress was severe); see Robinson, *Secretary Sues Employer over Bathroom Videotaping*, The Sun (Baltimore), Apr. 22, 1981, at C20, col. 1 (woman filed suit in Baltimore County Circuit Court alleging "intense and severe mental and emotional suffering and distress" caused by former employer's videotaping her use of the bathroom).

304. See *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977) (en banc) (reversing dismissal of suit against employer for intentional infliction of emotional distress by co-workers' and supervisors' racial jokes and slurs against Mexican-Americans and for wrongful termination); *MACKINNON*, *supra* note 1, at 167-69; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 54-55 (4th ed. 1971).

harass the plaintiff, and cause emotional distress, his conduct will be carefully scrutinized."³⁰⁵ Where the harassment is not by the employer or its agent, recovery for tortious interference with an employee's contract rights is sometimes available.³⁰⁶

If an employer is the harasser, the employee may have a cause of action for breach of contract. In several cases in which an employer had hired a woman without a written contract so that she could be fired at will, but the employer fired her because she rejected his sexual advances, the woman has recovered under an implied contract theory.³⁰⁷ Similarly, the Court of Appeals of Maryland has recently recognized a cause of action for abusive dis-

305. *Harris v. Jones*, 281 Md. 560, 569, 380 A.2d 611, 614-15 (1977).

306. *E.g.*, *Guyette v. Stauffer Chem. Co.*, 4 EMPL. PRAC. GUIDE (CCH) (27 Empl. Prac. Dec.) ¶ 32,138, at 22,220-21 (D.N.J. June 17, 1981) (pendent jurisdiction in Title VII sexual harassment suit of plaintiffs' claims of intentional interference by co-workers with contractual relations); *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 950 (D.N.J.) (punitive damages awarded for intentional interference with contract), *vacated in part on other grounds*, 473 F. Supp. 786 (D.N.J. 1978), *decision on relief for individual plaintiff*, 476 F. Supp. 335, 340-41 (D.N.J. 1979); *see* Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 137 n.62 (1977); Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 895-98 (1980). *Contra*, *Clark v. World Airways, Inc.*, 24 Empl. Prac. Dec. ¶ 31,385 (D.D.C. 1980) (default judgment for plaintiff for interference with contract set aside because employer cannot tortiously interfere with its own contract, therefore an agent of the employer cannot tortiously interfere with plaintiff's contract; nor is theory generally applicable with regard to one who seeks no commercial advantage from his wrong or with regard to a contract at will).

307. *See Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (3 to 1 decision) (woman fired in bad faith, when personnel manager knew her foreman's advances had been repelled by her, had cause of action for breach of contract); MACKINNON, *supra* note 1, at 74-75 (reporting settlement of a case involving similar claim); Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 136 n.62 (1977); Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 151, 175-76 (1979); *cf.* Tybor, *Fired 'Whistleblower' Can Seek Damages*, Nat'l L.J., May 4, 1981, at 3, col. 1 (Illinois Supreme Court in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), expanded the tort of "retaliatory discharge"). *But see Comerford v. International Harvester Co.*, 235 Ala. 376, 178 So. 894 (1938) (no breach of contract not to terminate plaintiff as long as services satisfactory when plaintiff fired because his wife would not submit to sexual advances made by plaintiff's employer). Closely related to the implied contract theory is the theory that the employer committed fraud and deceit when hiring the plaintiff. *See* Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 902-05 (1980).

Union contracts' common provision that an employee not be terminated except for "just cause" might also provide an avenue of relief. MACKINNON, *supra* note 1, at 159; *see* SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at H-6, H-7, H-13. *But see id.* at 69, H-7 (cases in which union not helpful).

charge of an at-will employee.³⁰⁸

In view of the non-Title VII alternatives available to harassment victims,³⁰⁹ the EEOC had no compelling need to exceed its

308. *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981). In an opinion written by Chief Judge Murphy, the unanimous court stated that an "at will" employee may sue if his or her dismissal "contravenes some clear mandate of public policy" expressed either in court decisions or in statutes passed by the General Assembly. The case involved allegations of firing for having uncovered corruption, but the language suggests that invidiously discriminatory discharges might also be actionable. The countervailing argument would be that, under the principle of *expressio unius est exclusio alterius*, article 49B of the Maryland Annotated Code provides the only state remedy for sex discrimination because the legislature covered those acts it intended to cover in article 49B. See MD. ANN. CODE art. 49B, § 16 (1979).
309. For various reasons, the common law theories may not be as attractive to a potential plaintiff as would a Title VII theory. They do not give, as does Title VII, explicit protection from retaliatory conduct by his or her employer for having filed the charge. Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (1976). Under Title VII, an employee may receive equitable remedies including an injunction. *Id.* § 706(g), 42 U.S.C. § 2000e-5(g); see 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 55.41 (rev. ed. 1980 & Supp. 1980); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 160-61 (1979). The result of an injunction is often that more than the individual plaintiff will be protected. Under Title VII, at no out-of-pocket cost, an employee can put a great deal of pressure on an employer by simply filing a charge of discrimination with the EEOC. See notes 67-69 and accompanying text *supra*. If an employee eventually goes to court and wins, Title VII provides for recovery of attorneys' fees. Civil Rights Act of 1964 § 706(k), 42 U.S.C. § 2000e-5(k) (1976); see *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415-22 (1978) (prevailing plaintiff will ordinarily be awarded attorneys' fees, but prevailing defendants will be awarded attorneys' fees only if plaintiff's action was frivolous). As a result, lawyers are more likely to accept a Title VII case than a tort case where monetary damages are slim.

On the other hand, in a common law suit, punitive damages may be recoverable, whereas they are not under Title VII. *E.g.*, *DeGrace v. Rumsfeld*, 614 F.2d 796, 808 (1st Cir. 1980); *Kyriazi v. Western Elec. Co.*, 476 F. Supp. 335, 340-41 (D.N.J. 1979) (punitive damages awarded for intentional interference with contract); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160 (S.D. Ohio 1976); see 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 55.42 (rev. ed. 1980 & Supp. 1980); Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 136 n.62 (1977); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 160 (1979). Compensatory damages for physical and emotional problems resulting from the harassment may also be available in a tort suit. *E.g.*, *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 950 (D.N.J. 1978) (compensatory and punitive damages available for tortious interference with plaintiff's employment contract); see *Lublin, Resisting Advances: Employers Act to Curb Sex Harassing on Job; Lawsuits, Fines Feared*, Wall St. J., Apr. 23, 1981, at 1, col. 1 (\$140,000 verdict plus interest awarded against Ford Motor Company and plant foreman for promising woman easier work in exchange for sexual favors); Annot., 61 A.L.R.3d 944 (1975 & Supp. 1980). *But cf.* *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 134, 316 A.2d 549, 552 (1974) (award of damages for mental suffering in breach of contract action improper). They are not recoverable in a Title VII suit. *E.g.*, *DeGrace v. Rumsfeld*, 614 F.2d 796, 808 (1st Cir. 1980); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160 (S.D. Ohio 1976) (but court did award nominal damages); see 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 55.43 (rev. ed. 1980 & Supp. 1980); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 160-61 (1979). *But cf.* *Broadway Realty v. New York State Div. of Human Rights*, 49 A.D.2d 422, 376 N.Y.S.2d 17 (1975) (plaintiff awarded \$100 for mental anguish and humiliation resulting from defendant's violation of state fair employment practices law); *School Dist. v. Nilsen*, 271 Or. 461, 534 P.2d 1135 (1975) (under facts of the case, money damages not warranted for humiliation because of defendant's violation of state fair employment practices law). See generally Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort*

delegated powers by failing to require, in its sexual harassment guidelines, a comparison of the treatment of similarly situated men and women. The Senate Labor Committee³¹⁰ and President Reagan's Task Force on Regulatory Relief,³¹¹ in their review of the EEOC guidelines, should redraft the guidelines to make it clear that the Title VII prohibition of sex discrimination covers all gender-based — but only gender-based — harassment. Absent redrafting, the EEOC and the courts should so construe the guidelines in order to make them consistent with Title VII.

VI. CONCLUSION

The Equal Employment Opportunity Commission's recognition that sexual harassment is a serious problem is welcome. Its guidelines on the subject have, with good reason, been termed a "major step" forward in women's fight for equality in employment.³¹² To the extent that the guidelines are a clear, correct interpretation of Title VII they offer new predictability and uniformity for the law of sexual harassment.

On the other hand, by overlooking the threshold question in Title VII gender discrimination cases of whether similarly situated males and females are being or would be treated differently, the guidelines are both underinclusive and overinclusive. The

Actions, 10 GOLDEN GATE U. L. REV. 879, 888-95 (1980).

An employee can be fired with impunity for filing a tort suit; his or her only remedy would be damages. Unemployment compensation, however, might be available. See Caldwell v. Hodgeman, 4 EMPL. PRAC. GUIDE (CCH) (26 Empl. Prac. Dec.) ¶ 31,932 (Mass. Dist. Ct. Apr. 6, 1981) (women who quit their jobs because of sexual harassment have the right to collect unemployment benefits); Note, *Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 HARV. WOMEN'S L.J. 173 (1980). See also MACKINNON, *supra* note 1, at 42-43, 77-81, 260-61 n.108. But see Colduvell v. Commonwealth, 48 Pa. Commw. Ct. 185, 408 A.2d 1207 (1979) (unemployment compensation denied where employee held not to have made a reasonable attempt to stay on the job when she quit without telling her employer about sexual harassment by office manager; fact that she tried once but he was too busy to talk to her was insufficient); McCain v. Employment Div., 17 Or. App. 442, 522 P.2d 1208 (1974) (plaintiff unjustified under state unemployment compensation law in quitting because of poster in male employees' lunchroom portraying the "perfect woman" as having only a torso; poster, of woman in a bikini, on the office wall; and postcard of nude woman on manager's desk).

One possible complication in recovering under a common law theory for a work-related wrong is a requirement, as in California, that workers' compensation be shown to be unavailable and therefore not the exclusive remedy. See Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 882, 906-21 (1980). But see, e.g., Meyer v. Graphic Arts Int'l Union, 88 Cal. App. 3d 176, 178, 151 Cal. Rptr. 597, 599 (1979) (workers' compensation not the exclusive remedy for intentional wrongs).

310. Lublin, *Resisting Advances: Employers Act to Curb Sex Harassing on the Job; Lawsuits, Fines Feared*, Wall St. J., Apr. 23, 1981, at 1, col. 1.

311. The administration has announced that the task force, chaired by Vice-President Bush, is "considering major changes" in the EEOC sexual harassment guidelines. Nordlinger, The Sun (Baltimore), Aug. 13, 1981, at A1, col. 3.

312. *Sex Harassment on Job: New Rules Issued*, 66 A.B.A.J. 703 (1980) (quoting Nancy Kreiter, Research Director of Women Employed in Chicago).

ambiguity of the guidelines also gives rise to the possibility that the EEOC or the courts may apply them improperly and find sexual harassment actionable when it results in either no harm or only de minimus harm. This becomes particularly worrisome when coupled with the broad language regarding employers' liability for acts by non-employees. In order to use the EEOC's limited resources efficiently,³¹³ and to ensure that the taxpayers and employers do not shoulder unnecessary costs,³¹⁴ the EEOC and the courts must apply the guidelines in a manner consistent with the limitations of Title VII.

As Dr. Pangloss demonstrated to Candide long ago, the world is far from pure. The EEOC cannot promulgate a perfect world. Congress has not charged the agency with that mission. The guidelines should be construed to make actionable only harassment practiced by the employer or its agents on members of one sex but not of the other, which has significant adverse employment effects for the victim. Provisions concerning the employer's liability for acts by non-agent employees and non-employees should be read narrowly. To the extent that Title VII does not provide a remedy for sexual harassment, adequate recourse is available directly against the harasser under common law theories.

313. The projected EEOC budget for fiscal 1982 is \$160 million and the projected full-time staff is 3,790 employees. BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1982, H.R. DOC. NO. 97-2, 97th Cong., 1st Sess. I-V21 & I-V22.

314. A Business Round Table study by the accounting firm of Arthur Anderson & Co. found that EEOC regulations resulted in incremental costs of \$217 million to 48 large companies in 1977. Telephone Conversation with Martin Lefkowitz, United States Chamber of Commerce (Feb. 23, 1981). In the EEOC's estimation, the sexual harassment guidelines will impose "no regulatory burdens or recordkeeping requirements" and have no "major impact on the economy," so that it was not required to prepare a regulatory analysis. 45 Fed. Reg. 25,024 (1980). But national productivity would be unnecessarily lessened to the extent of the tax dollars and the employers' time and money spent investigating and defending against charges that are without a basis in Title VII.

President Reagan will have federal agencies propound economic impact statements before promulgating new regulations. Weidenbaum, *Regulation: How Washington Will Switch*, NATION'S BUS., Feb. 1981, at 26; see Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). A transition task force has recommended to President Reagan that all new EEOC guidelines be reviewed by the Office of Management and Budget's Office of Civil Rights and that there be a one-year freeze on new EEOC guidelines. 2 EMPL. PRAC. GUIDE (CCH) ¶ 5186 (Jan. 1981).

Of course, where sexual harassment exists, it is costly to the employer. The replacement of sexually harassed workers who leave their jobs, the payment of sick leave and medical insurance benefits for harassed employees, and the cost of decreased productivity is estimated to have cost the federal government \$189 million between May 1978 and May 1980. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 2, at 75-84.